105

No. (1)

Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

MARVIN CHISOLM,

Petitioner,

v.

GARY BOLING, CARLA COHEN, TOM DOHRMANN, BETTY GRAY, TARA GAUNTT, CURT JOHNSTON, KATHRYN JONES, HEATHER MOODY, JOE REDDEN, BEVERLY SHOUN, KELLY J. SULLIVAN, LINDSEY TIPPENS, COBB COUNTY SCHOOL DISTRICT,

Respondents.

On Petition For Writ Of Certiorari To The Georgia Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED FOR REVIEW

(1) Whether the decision of the Georgia Court of Appeals erroneously concluded that the Respondeat Superior doctrine; Georgia Constitution Article I, Section II, Paragraph IX; 42 U.S.C. 1983, 20 U.S.C. 1232g(**a**)(b)(d)(**e**), OCGA 20-2-720 para. 1, pg 531; and the Fourteenth Amendment to the United States Constitution is not applicable to superiors and employees who with deliberate negligence and actual malice fail to perform their ministerial and discretionary duties and is not applicable to state entities that deprive a person(s) of rights, and deny the person(s) equal protection of the laws.

(2) Whether the decision of the Georgia Court of Appeals decision conflicts with the Ninth Circuit Court of Appeals decision in *Cohen v. Cahill*, 281 F.2d 879 (9th Cir. 1960) which held the trial court erred in dismissing complaint without permitting plaintiff to submit affidavits opposing motion to dismiss; and conflicts with this Court's decision in *Conley v. Gibson*, 355 U.S. 41 (1957), which held that complaint, filed by American of African descent employees against their union, sufficiently alleged breach of union's statutory duty to fairly represent all its employees without hostile discrimination; and conflicts with this Court's decision in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), Chief Justice Burger held that when a state officer acts under state law in a manner violative of the Federal Constitution ***he comes into conflict with the superior authority of that Constitution . . . and subjected in his person to consequence of his individual conduct***.

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OPINIONS BELOW

The opinions entered by the courts below are contained in the appendix[1] of this Petition. The Georgia Court of Appeals denied reconsideration is reproduced at App. 1-2. The opinion of the Georgia Court of Appeals affirming the Georgia State Court's judgment are reproduced at App. 3-14. The order of dismissal and opinion prepared by the defendants entered by the State Court at App. 15-30. The opinion of the District Court to remand state law claims to the State Court of Cobb County, Georgia are reproduced at App. 31-41. The order entered by the District Court to deny Defendants' motion to strike is reproduced at Appendix 42-45. The State Court order to deny defendant's motion to dismiss appeal is reproduced at App. 46-47. The order of the Georgia Supreme Court granting request for extension to file motion for reconsideration is reproduced at App. 48. The judgment of the Georgia Supreme Court denying petition for certiorari is reproduced at App. 49. The order of the Georgia Supreme Court denying motion for reconsideration is reproduced at App. 50.

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[1] References to the Appendix appear as "App. ___." Unless otherwise indicated, undersigned pro se herein has supplied all emphasis.

JURISDICTION

The decision of the Georgia Court of Appeals entered on February 26, 2008, App. 1, and Petitioner's timely petitions for certiorari, and motion for reconsideration with the Supreme Court of Georgia were denied on June 2, 2008 and June 30, 2008. Petitioner invokes this Court's jurisdiction under 28 U.S.C. 1257(a).

STATUTORY PROVISIONS INVOLVED

A. Civil Rights:

42 U.S.C. 1983 of the Civil Rights Act of 1871 provides in relevant part:

"Civil action for deprivation of rights."

(a) "***Every person*** who, ***under color of any statute, ordinance, regulation, custom, or usage, of any State*** . . . ***subjects, or causes to be subjected*** any citizen of the United States or other person within the jurisdiction thereof to the ***deprivation of any rights, privileges, or immunities*** secured by the Constitution and laws, ***shall be liable*** to the party injured in an action at law, suit in equity or other proper proceeding for redress.

B. 20 U.S.C. 1232g of the Nov. 1, 1978, P.L. 95-561 provides in relevant part:

"Family educational and privacy rights."

(b) "'***No funds*** shall be made available under any applicable program ***to any*** educational agency or institution which has ***a policy denying***, or which ***effectively prevents***, **THE PARENTS** ***of students*** who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the records of ***their children***' .. and '***unless*** such agency or institution ***effectively informs*** **THE PARENTS** ***of students***, or **THE STUDENTS** if they are eighteen years or older [emancipated], or are attending an institution of post secondary education, ***of the rights accorded them by this section***'."

C. OCGA 20-2-720 of Ga. Law of 1919 provides in relevant part:

"Inspection of students' records by parents."

(c) "***No local school system, whether county***, independent, or ***area***, shall have a policy ***denying***, or which ***effectively prevents***, **THE PARENTS** ***of students*** who are in attendance at or who have been enrolled in any facility within such system the right to inspect and review the educational records of ***their children*** . . . **BOTH PARENTS** of a child shall be ***entitled*** to inspect and review the educational of their child or to be provided

information concerning ***their child's progress***. Information concerning a child's education record shall not be withheld from the noncustodial parent ***unless*** a court order has specifically removed the right of the noncustodial parent to such information or **unless** parental rights has been terminated.

D. Fourteenth Amendment to the Constitution of the United States of America states:

"***No State*** shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

E. Georgia Constitution Article 1, Section II, Paragraph IX states in relative part:

"***No immunity is provided*** for ministerial acts negligently performed or for ministerial or discretionary acts performed with "***actual malice***" – a deliberate intention to do wrong.

Liability of governmental entity under doctrine of respondeat superior. – "The official immunity of a public employee ***does not protect*** a governmental entity from liability under the doctrine of respondeat superior **nor** is official and sovereign immunity extended to governmental employees and entities for negligently performed ministerial acts or discretionary acts performed or omitted with ***express malice – a malice in fact***

done under the color of the law via ***deliberate misconduct of the employees and the policy makers to injure and deprive a person of their civil rights***.

STATEMENT OF THE CASE AND MATERIAL FACTS

A. Proceedings

Petitioner filed this action on October 9, 2006 in the Georgia State Court of Cobb County against Respondent Cobb County School District et al., seeking to recover damages for injury resulting from respondents' inflicting acts under the color of the law with actual malice to cause intentional harm and suffering to deprive petitioner and unemancipated minor child of rights privileges, or immunities secured by the United States Constitution, Georgia Constitution, 42 U.S.C. 1983, 20 U.S.C. 1232g, OCGA 20-2-720, superior court order; and applicable laws, doctrines, and policies afforded to other students and parents. App. 98.

Respondent Cobb County School District on November 13, 2006 filed notice of removal to the U.S. District Court for the Northern District of Georgia. Petitioner on November 17, 2006 filed notice to remand to the State Court of Cobb County Georgia.

Respondent followed with a motion to dismiss on November 20, 2006. Petitioner countered with a dual

motion for summary judgment on November 27, 2006 at the district and state courts.

Citing, *inter alia*, the Eleventh Circuit's decision in *Theoharus v. Fong*, 256 F.3d 1219, 1224 (11th Cir. 2001), the district court on March 19, 2007 entered an order to granting Petitioner's action be dismissed pursuant to the federal law claims and remanded the remaining state law claims to the state court.

Citing, *inter se,* a host of decisions, the Respondents' school district agent attorney and the state court on May 21, 2007 entered an order granting dismissal of Petitioner's complaint as opposed to the state court solely rendering a just decision based on the merits of Petitioner's case.

Petitioner timely appealed the order of dismissal to the Georgia Court of Appeals, which affirmed the order of dismissal with an opinion. The appeals court denied Petitioner's timely motion for reconsideration on February 26, 2008. Petitioner timely filed a petition for certiorari review with the Georgia Supreme Court, which denied the discretionary review. The Georgia Supreme Court denied Petitioner's timely motion for consideration on June 30, 2008. Petitioner now files this petition seeking certiorari review by the United States Supreme Court.

B. Statement of pertinent facts

Petitioner Marvin Chisolm, a law abiding citizen of the United States, is a 20-year honorably discharged

army retiree and a disabled veteran. Petitioner's daughter Paris A. Chisolm's attendance at school maintained petitioner's and Cobb County School District's parental involvement relationship; and Petitioner ***fulfilling his parental duties*** and responsibilities as a caring and loving father, ***an involved parent***, and a PTA member.[2]

'The Respondent' Cobb County School District officials '**under color of the law**' violated 42 U.S.C. 1983 by dividing Petitioner's daughter into ***a low ability thug school outside her living area***; the school district officials and subordinate employees ***with express malice*** denied necessary and appropriate treatment and education as requested by Petitioner for student Chisolm a child with documented learning difficulties compounded with a known medically documented physical disability; the school district officials and subordinate employees ***with willfulness, corruption, and actual malice deliberately inflicted injuries and damages*** to student Chisolm and Petitioner by failure to perform their discretionary duties and via ***negligent failure*** to perform their purely simple ministerial duties; and ***with malice in fact*** school district official(s) and employee(s) published a *libelous per se* statement and/or uttered comments known to be false or with a

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[2] Since the Petitioner's complaint was dismissed with prejudice on Defendant's motion, review has been and is *de novo*, with all of Petitioner's allegations accepted as true. *See, e.g., Conley v. Gibson*, 355 U.S. 41 (1957).

reckless disregard for its truth or falsity; tending to harm petitioner's reputation, imply criminal conduct, subjected petitioner to public disgrace; and exposed petitioner to the public [county] hatred, contempt, ridicule, and harassment by law enforcement, public entities, and the people in the community.[3] App. 61.

As set out above, the district court dismissed Petitioner's federal claims and remanded state claims to the state court. The state court ruled in the Respondent's favor and dismissed the Petitioner's action with prejudice, App. 30, whereafter the dismissal was affirmed by the Georgia Appeals Court with opinion. The Georgia Supreme Court denied discretionary review and reconsideration as to which the Petitioner here seeks review.

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[3] Responsibility and accountability of the Respondent school district officials and subordinate employees. *Review, e.g., Simmons ex rel. Simmons v. Hooks*, 843 F.Supp. 1296 (E.D. Ark. 1994); *Howard v. Friendswood Independent School Dist.*, 454 F.Supp 634 (S.D. Tex. 1978) ; *Nichols v. Prather*, 650 S.E.2d 380 (Ga. App. 2007); *Jones v. Bales*, 58 FRD 453 (N.D. Ga. 1972), *aff'd*, 480 F.2d 805 (5th Cir. 1973).

ARGUMENT

A. Background law as to the interaction between the application of sovereign immunity to municipalities, counties, school districts and the nonabsolute exception in fairness to the public.

Courts in this nation have come to favor sovereign immunity as a desirable alternative to litigation – as an efficient means of disposing of an injured party's "action at law, suit in equity, or other proper proceeding for redress. In this context, oft-repeated in case law on the subject is that any doubts should be resolved in favor of sovereign immunity." *See, e.g., Hiers v. Barwick,* 262 Ga. 129, 414 S.E.2d 647 (1992) *and the lodestar rule Gilbert v. Richardson*, 264 Ga. 744, 452 S.E.2d 476 (1994).

However, as recognized by the Civil Rights Act of 1871 and revised to 42 U.S.C. 1983, it is 'glaringly apparent' that sovereign immunity in many to some cases, become powerful retaliatory and reprisal weapons which nourish oppression, malfeasance, and corruption. *See Georgia Supreme Court interpretation in Thomaston v. Bridges*, 264 Ga. 4, 7, 439 S.E.2d 906 (1994). The Court's decision in *Gilbert* was inconsistent with its determination in *Thomaston* in which the Court failed to acknowledge its previous decision.[4]

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[4] The Court reasoned, "although we construed the language in former [Ga. Const.] Art.I, Sec.II, Par IX to include municipalities, we cannot allow that construction,

(Continued on following page)

which effectuate the intent behind the 1983 provision, to bind this court to a construction which directly conflicts with the obvious intent of the drafters of the 1991 amendment and contravenes the cardinal rule of construction.

The Court inferred that the intent of the 1991 amendment was manifest from the vote of the electorate and the express language of the General Assembly that the 1991 amendment was intended to address **"the inherent unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity." Nothing in the history of the 1991 amendment intimates any intention by the voters or the legislature to reinstate sovereign immunity in an absolute form so as to terminate completely the public's ability to bring an action for damages against a Georgia governmental entity.**

It is well-established principle that a public official who fails to perform purely ministerial duties **required by law is subject to an action for damages by one who is injured by his (her) omission.** However, it is equally well established that where an officer is invested with discretion and is empowered to exercise his judgment in matters brought before him, he (she) is sometimes called a quasi-judicial officer, and when so acting he (she) is usually given immunity from liability to persons who may be injured as the result of an erroneous decision; **provided the acts complained of are within the scope of the officer's authority, and *without willfulness, malice, or corruption*.** Such discretionary acts lie midway between judicial and ministerial ones and the question depends on **THE CHARACTER OF THE ACT**. *Sisson v. Douglas County School Dist.*, 181 Ga. App. 77, 79, 351 S.E.2d 272 (1986).

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Based upon the merits of Petitioner's complaint, preponderance of evidence, action at law, suit for redress, discovery requests with first set of interrogatories and requests for admissions, statement of undisputed material facts, and motion(s) for summary judgment supported with 'good faith affidavits' it is reasonable to conclude that this is a case that is predicated on the ***'character of the acts'*** of the Respondent (also of the respondent in defense of Petitioner's filings) which were under the color of the law with willfullness, actual malice, and corruption **for ten consecutive school years [October 1997 to November 2006] and this Court must decide.**

The State Court, District Court, Georgia Court of Appeals, and Georgia Supreme Court decisions must be examined against the historical backdrop of this still-governing immunity law. The valid question that must be answered is on whether it is perfectly clear

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The 1991 constitutional amendment **provides no official immunity defense** for ministerial acts negligently performed with or for discretionary acts performed with actual malice or an in intent to injure [nor does official immunity of a public officer or subordinate employee protect a governmental entity from liability-sovereign immunity for "acts under the color of the law" under the doctrine of respondeat superior resulting from a policy, custom or tradition of the local school governance district-board.]. *See generally Merrow v. Hawkins*, 266 Ga. 390, 467 S.E.2d 336 (1996) and *Mladek v. Day*, 293 F.Supp.2d 1297, 1303(I)(B) (M.D. Ga. 2003).

that every issue the courts interpreted to reach the decision is based on **a norm** to decide in favor of the school district's quest for mandatory enjoyment of sovereign immunity to render the public powerless against actual malice acts and deliberate negligent acts in a civil action for deprivation of rights. And, **it is imperative** that this Court answer the question, because **the fate of "the little ones" – future generations** are at stake and in the hands of 'good school' districts and unfortunately, also in the hands of some rogue oppressive county school district regimes with its 'past era' norms, traditions, and customs of racist intentions to stigmatize and discriminate against certain students.

B. The Georgia Court of Appeals decision does not comport with the legislative history of the statutes it has used to reach its conclusion.

The Court of Appeals decision is *based on its interpretation of the doctrine of official immunity and sovereign immunity*, particularly the facts and preponderance of the evidence for ten consecutive years as outlined in Petitioner's complaint, motion for reconsideration, and briefs establishes a prima facie case of Respondent with actual malice failure to perform purely ministerial duties required by law and discretionary duties with intent to injure student Chisolm [and Petitioner]. *See, e.g., Nichols v. Prather*, 650 S.E.2d 380 (Ga. App. 2007).

West's Georgia Constitution Article 1, Sec. 2, Par. 9(d) states:

> "Although the question of whether a governmental employee is entitled to official immunity is a question of law that must ultimately be decided by the trial court, when the relevant facts concerning the employee's behavior at the time of the alleged tort are in dispute, the court cannot resolve the factual issues on a motion for summary judgment; instead, a jury must resolve the conflicts in the facts, and the trial court may then determine whether the employees' acts were discretionary or ministerial and, thus, whether the employee is entitled to official immunity."

The *record* district and state courts were unable to resolve the factual issues on Petitioner's motion for summary judgment because the courts allowed the respondents to not present a defense to the Petitioner's motion for summary judgment supported with good-faith affidavits and also allowed the respondents to evade discovery. The respondents failed to answer Petitioner's '*first set of interrogatories and admissions.*' The Respondents and the *record* district and state courts prevented further relevant facts of the '*character of the acts*' of the Respondents behavior *to not be revealed.*

Federal Rules of Civil Procedure Rule 56(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall

be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary judgment is made and supported as provided in this Rule, an adverse party *may not rest upon mere allegations or denials* of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise provided in this Rule, ***must*** set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

42 U.S.C. 1983

> The Court of Appeals and District Court's interpretation of 42 U.S.C. 1983 are historically incorrect because 1983 provides a remedy only for the **deprivation** of rights secured by the Federal Constitution's Fourteenth Amendment. The Amendment clearly states that, ***No State shall make or enforce*** **ANY** ***law*** that abridge the privileges or immunities [**rights**] of U.S. citizens nor **deny to** any person ***within its jurisdiction equal protection of the laws***. 42 U.S.C. 1983 is a derivative of the Civil Rights Act of 1871 and provides injured citizens '***the mechanism***' through civil action to bring suit against and hold liable persons who under the color of the law deprive [and injure] citizens of **ANY** rights.

20 U.S.C. 1232g *Family educational and privacy* **RIGHTS** (1)(A) page 104(**e**) page 109

> No funds shall be available . . . to any educational agency or institution which has a policy of denying, or which effectively prevents the parents of students . . . **the RIGHT** to inspect and review the education records of their children . . . **unless** such agency or institution effectively informs the parents . . . of **the RIGHTS** accorded them by this section.

OCGA 20-2-720 *Inspection of students' records by parents*

> No local school system, whether county, independent, or area, shall have **a policy** of denying, or which effectively prevents, the parents of students . . . **the RIGHT** to inspect and review the education records of their children.

Title VI of the Civil Rights of 1964 and Title IX of the Education Amendments of 1972

> ***No person*** in the United States ***shall*** . . . *be subjected to* ***discrimination*** under any program or activity receiving Federal financial assistance on the basis of race, color, or national origin"; and "***No person*** in the United States ***shall***, on the basis of sex, be subjected to ***discrimination*** under any education program or activity receiving Federal financial assistance.

Respondents', district court's, and appeals court's historically incorrect interpretation of 42 U.S.C. 1983 is based upon 20 U.S.C. 1232(g) nondisclosure provision of student's records to outside agencies without parental consent and the courts decisions on the matter of *Gonzaga University v. DOE*, 536 U.S. 273, 283, 285 (2002).[5]

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[5] Indeed, Petitioner's civil action is a case of deprivation of the right under the color of the law with actual malice and negligence – a policy of denying which effectively prevented petitioner parent the right to inspect and review his daughter's educational records for ten consecutive years; indeed respondent Cohen communicated a lie to petitioner informing petitioner of having "no right to see the records"; indeed respondents Boling and Shoun continued the actual malice with intent to injure child and established "the wall" of hindrance to effectively deny petitioner for ten years; indeed petitioner was allowed to inspect and review records one month after filing the action complaint. However, the respondents' *character of the acts* achieved its willful, malice in fact, corrupt purpose to leave student Chisolm behind, harass, libel, slander; and expose petitioner to public scorn, ridicule, and humiliation; and have petitioner undergo severe emotional distress. The Respondents and their attorney agent with the privilege of official and sovereign immunity are under the impression they can mistreat and abuse, oppress-stigmatize Petitioner and his daughter for ten years and there is no accountability, compensation, nor consequences for their actual malice misconduct – ***WRONG ANSWER.*** **PETITIONER IS A HONORABLY RETIRED SOLDIER, A DISABLED VETERAN, AND A LAW ABIDING CITIZEN.**

OCGA 9-3-33

> "Generally, rule of respondeat superior, under which principal is liable for torts of its employee committed while acting in scope of employment, is applicable in libel cases." *See, e.g., Ray v. Henco Elec. Inc.*, 156 Ga. App. 394, 274 S.E.2d 602 (1980).

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There appear to be discrepancy and inconsistency with the Courts' interpretation and decisions as it pertains to enforceable family educational and privacy rights and enforcement of the public's rights with regard to governmental employees, agencies, and institutions. The question – are the Courts making interpretations and decisions as to the way the 'governmental administrative *scheme*' thinks it should be or as secured by the United States Constitution and the Bill of Rights to form a more perfect Union for . . . ***We The People***.

C. The District/State Courts, Georgia Court of Appeals, and Georgia Supreme Court decisions directly conflicts with this Court's decision in *Scheuer v. Rhodes*, 416 U.S. 232 (1974) and *Conley v. Gibson*, 355 U.S. 41 (1957); also directly conflicts with the Ninth Circuit Court of Appeals decision in *Cohen v. Cahill*, 281 F.2d 879 (9th Cir. 1960)

This Court's decision in *Schuer v. Rhodes*. On certiorari,

"Written publication need only affect personal reputation to be actionable." *Huey v. Sechler*, 107 Ga. App. 467, 130 S.E.2d 754 (1963).

Civil rights actions. – **Two-year** limitation in actions for injuries is applicable to civil rights action.

Jones v. Bales, 58 F.R.D. 453 (N.D. Ga. 1972), *aff'd*, 480 F.2d 805 (5th Cir. 1973).

> Mr. Chief Justice Burger, held that when a state officer acts under [the color of] state law in a manner violative of the Federal Constitution he [she] comes into conflict with the superior authority of that Constitution and is stripped of his [her] official or representative character and subjected to consequences of his [her] individual conduct, and the actions, which sought to impose personal liability upon defendants as individuals, were not barred by the Eleventh Amendment . . . the District Court and Court of Appeals erroneously accepted as fact the good faith of the governor, and erroneously took judicial notice that mob rule existed at the university, where no opportunity had been afforded petitioner to contest the facts assumed in such conclusion.

At specific, when a governmental employee or official acts under the color of the law in violation to the U.S. Constitution he [she] is in conflict of the Constitution's superior authority to be subjected to the consequences of the *character of* acts and the state, county, municipality, or school district has *no power* to impart to him [her] *any* immunity from responsibility to supreme authority [the U.S. Constitution and Amendments-Bill of Rights] of United States.[6]

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[6] The 1871 civil rights statute included within its scope the misuse of power possessed by virtue of state law and made possible because wrongdoer is clothed with authority of state law; and government officials, as class, could not be totally exempt, by virtue of absolute immunity, from liability under its

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This Court's decision in *Conley v. Gibson*. On certiorari, Mr. Justice Black, held that complaint, filed by American of African descent railway employees against their union's *sufficiently* alleged breach of union's statutory duty to represent fairly and without *hostile discrimination* all of the employees in the union. *At specific, the complaint* then went on to allege that the Union had *failed* [either via actual malice or negligent performance] to represent American of African descent employees equally and in *good faith* [treated them differently to cause injury]. Also, the respondents argued that the complaint failed to set forth – specific facts to support its general allegations of discrimination and that its dismissal is therefore proper.[7] *See* FRCP Rule 8(a). However, the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he [she] bases the claim.

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terms. 42 U.S.C. 1983 It has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he [she] deprived another of a federal right under the color of the law. *See Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

[7] The decisive answer to this is that Federal Rules of Civil Procedure do not require claimant to set out in detail the facts upon which he bases his [her] claim. To the contrary all the Rules require is "a short and plain statement of the claim" that will give the respondent fair notice of what the plaintiff's claim is and the grounds upon which it rests. Such simplified "notice pleading" is made possible by the liberal OPPORTUNITY FOR DISCOVERY and other pre trial procedures.

The Ninth Circuit's decision in *Cohen v. Cahill*, action for damages based on claim that defendants acting under color [of the law] of state custom or usage deprived plaintiff of rights guaranteed by federal constitution. On appeal, Circuit Judge Stevens, held that allegations of complaint stated a cause of action cognizable by trial [record] court under statute, and where *affidavits were submitted on behalf of defendant* trial [record] court erred in dismissing complaint as a sham without permitting plaintiff to submit [respond with good faith] affidavits opposing motion to dismiss. *At specific*, trial court erred in dismissing complaint as a sham without permitting plaintiff to submit affidavits in opposition to affidavits submitted by defendants seeking to have complaint dismissed.[8] *See* FRCP Rule 56 and FRCP Rule 12(b). That the Federal Rules of Civil Procedure provides for motions to dismiss a complaint *to be accompanied by affidavits* and other materials beyond the pleadings are *undeniable*.

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[8] Defendants motion for dismissal for failure to state a claim upon which relief can be granted, supported with affidavits outside the pleadings, and not excluded by the court are treated shall be treated as a motion for summary judgment and ALL PARTIES SHALL BE GIVEN REASONABLE OPPORTUNITY TO PRESENT PERTINENT MATERIAL AS REQUIRED BY RULE 56. Likewise, the district and record court erred when it absolved Respondent(s) from fulfilling their requirement [given reasonable opportunity] to respond via opposing affidavits to Petitioner's motion for summary judgment and supporting affidavits.

Petitioner respectfully submits that the District and Georgia Courts decisions are incomprehensible and the Courts overstepped its bounds in disregarding the controlling *Scheuer, Conley,* and *Cohen* decisions with no legal justification for doing so. "Decisions of the United States Supreme Court rendered by written opinions are binding on all courts, state and federal. Equally, unthinkable is the appearance of the Federal Rules of Civil Procedure not being adhered to nor being enforced by the Courts as to favor governmental [school district-Respondent] employees, agencies, institutions, and entities as to essentially deny ordinary citizens [Petitioner] within its jurisdiction equal protection under the laws.

Because of the conflict that has arisen to this Court's precedent, because of the significance of "rights that are in limbo", and because of my daughter and many "little ones" stigmatized and left behind, Petitioner respectfully submits that a basis for review is presented.

D. Summation as to the reasons for granting the writ

The Georgia Court of Appeals decision has concluded that Petitioner's complaint failed to state a claim for relief. *In particular*, the court found that defendant school officials and employees were immune from liability.

Contained within the main issue as to whether the Georgia Court of Appeals decision should be

allowed to stand are substantial questions as to the reasoning utilized by the Appeals court in arriving at its conclusions, including: (1) whether the Appeals Court is privileged to ignore this Court's oft-repeated directive that state officials and employees who acts under color of the law to violate the federal constitution is *stripped of immunity* coupled with the respondents, district and state courts *acting prematurely* and hence erroneously in dismissing the complaint as it did *without affording petitioner any opportunity by subsequent proof* to establish his claim(s); (2) whether the Appeals Court was so preoccupied with its zealous odyssey to dismiss petitioner's complaint to the point of overlooking the fact that FRCP Rule 8 does not require claimant to set out a detail 'novel' upon which to base a claim; and petitioner sufficiently alleged failure of the respondents to fulfill their ministerial and discretionary duties for ten years with negligence and express malice while subjecting petitioner and daughter to hostile discrimination; (3) and alongside the district and state courts overlooked and misapplied controlling authority toward the benevolence of the respondents by not holding respondents accountable to present a defense against petitioner's motion for summary judgment supported with affidavits; and erred by dismissing petitioner's complaint without permitting respondents to submit affidavits opposing motion for summary judgment and allowed respondents to evade discovery thereby hindering the process to uncover relevant facts which is contradictory to FRCP 12(b) and 56(e).

The questions as to the validity of Georgia Court of Appeals decision are believed to warrant issuance of a writ here because the decision undoes over a century of efforts on the part of the U.S. federal courts and Congress to protect the rights of **WE THE PEOPLE**.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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Court of Appeals
of the State of Georgia

ATLANTA, FEB 26 2008

The Court of Appeals hereby passes the following order:

A07A2356. CHISOLM v. TIPPENS ET AL.

We affirmed the dismissal of Marvin Chisolm's pro se action asserting various federal and state claims arising from defendants' alleged actions in denying Chisolm access to his daughter's educational records and rejecting his request for a full evaluation of her to rule out a learning disorder, concluding that Chisolm's complaint failed to state a claim for relief. In particular, we found that defendant school officials and employees were immune from liability. Chisolm has filed a motion for reconsideration, repeating the enumerations of error asserted in his original brief and reiterating that defendants are not immune from liability because the facts show that they acted wilfully, maliciously, and with a deliberate intent to injure. Chisolm also contends that the state court should have granted summary judgment in his favor.

Chisolm has not demonstrated that we overlooked a material fact in the record or misapplied controlling authority. Accordingly, his motion for reconsideration in the above-referenced appeal is hereby DENIED.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta FEB 26 2008

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Illegible, *Clerk.*

SECOND DIVISION
JOHNSON, P. J.,
PHIPPS and MIKELL, JJ.

February 5, 2008

In the Court of Appeals of Georgia

A07A2356. CHISOLM v. TIPPENS ET. AL.

MIKELL, Judge.

Marvin Chisolm, pro se, filed suit against the Cobb County School District and various school officials and employees, including teachers and principals (collectively "defendants"), asserting various federal claims and state claims, including mental anguish, neglect, harassment, cruelty, reprisal, discrimination, defamation, and punitive damages all arising from defendants' alleged actions in denying Chisolm access to his daughter's educational records and rejecting his request for a full evaluation of her to rule out a learning disorder. The trial court granted defendants' motion to dismiss for failure to state a claim, and we affirm.

> A motion to dismiss may only be granted if the allegations in the complaint disclose with certainty that the plaintiff would not be entitled to relief under any state of facts that could be proved in support of the claim. We review the trial court's ruling on a motion to

> dismiss de novo, construing the pleadings in favor of the plaintiff.[1]

According to the complaint, Chisolm has joint legal custody of his daughter, Paris A. Chisolm, a student who attended Norton Park Elementary School and Floyd Middle School in the Cobb County School District, from October 3, 1997, through 2005. Paris allegedly suffers from medical conditions affecting her eyesight and has been identified as developmentally delayed. From 1997 through 2005, Chisolm was denied access to review school records, report cards, and progress reports pertaining to his daughter. On October 15, 2003, Chisolm requested a full evaluation of his daughter to rule out a learning disorder. This request was denied. Subsequently, Chisolm complained to the State Department of Education, the United States Department of Education Civil Rights Office, and elected officials. From 2004 through 2005, Chisolm withdrew his complaints pending a decision by Floyd Middle School to place his daughter in a special reading and writing class. Floyd Middle School did not do so. Chisolm also alleges that on April 30, 2005, he was harassed off school grounds by defendant Kelly Sullivan, a teacher at Floyd Middle School, who "was exhibiting herself and a gentleman in an attempt to . . . intimidate," and who

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[1] (Punctuation and footnotes omitted.) *Reid v. City of Albany*, 276 Ga. App. 171 (622 SE2d 875) (2005). See also *Bynum v. Horizon Staffing*, 266 Ga. App. 337, 338 (1) (596 SE2d 648) (2004).

later "utilized deception, false accusations, in a letter to me and utterance which constitute defamation of my character and libel/slander."

On October 9, 2006, Chisolm filed the instant action in the State Court of Cobb County against Cobb County and the School District defendants alleging discrimination under Section 504 of the Rehabilitation Act, 29 USC § 794, violations of the Individuals with Disabilities Education Act, 20 USC § 1400, et seq., violations of the No Child Left Behind Act, 20 USC § 6301, et seq., and various state claims, including mental anguish, neglect, harassment, cruelty, reprisal, discrimination, and defamation, and seeking $12,000,000 in general and special damages, and $2,000,000 in punitive damages. On November 13, 2006, defendants filed a notice of removal to federal court and a motion to dismiss. On November 27, 2006, Chisolm filed motions for summary judgment in state and federal court. Defendants responded to the motion for summary judgment and moved to dismiss the complaint. The district court granted the motion to dismiss as to all claims asserted under federal law,[2] but denied it as to the state law claims, denied Chisolm's motion for summary

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[2] To the extent Chisolm contends that he is entitled to pursue his federal law claims in state court, we note that res judicata precludes the relitigation of those claims. See *Bradley v. Ga. Institute of Technology*, 228 Ga. App. 216, 217 (1) (491 SE2d 453) (1997) (federal court's entry of summary judgment against plaintiff/employee in prior Title VII race discrimination claim precluded her from raising identical claim in state court).

judgment as moot, and remanded the case back to the state court. Defendants then filed a motion to dismiss all state claims for failure to state a claim, which was granted by the trial court. This appeal followed.

1. We first address defendants' claim that this appeal should be dismissed because Chisolm has not raised any legal issues in his enumerated errors. In this regard,

> we are guided by the general rule that pro se pleadings are held to less stringent standards than pleadings that are drafted by lawyers, and by the statutory provision that where it is apparent from the notice of appeal, the record, the enumeration of errors, or any combination of the foregoing what errors are sought to be asserted upon appeal, the appeal shall be considered in accordance therewith notwithstanding that the enumeration of errors fails to enumerate clearly the errors sought to be reviewed.[3]

Though Chisolm's enumerations of error are somewhat convoluted and unclear, we review them in accordance with these standards.

2. In three related enumerations of error, Chisolm contends that the trial court erred in granting defendants' motion to dismiss because defendants acted in a malicious and discriminatory manner in

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[3] (Punctuation and footnote omitted.) *Jorisch v. Rhythm Festival, Inc.*, 247 Ga. App. 470, 472 (1) (544 SE2d 459) (2001).

obstructing his efforts to become involved in Paris's education, in refusing Chisolm's "full evaluation testing request," in denying Paris much-needed academic assistance, and in "setting up" Paris for failure.

(a) Chisolm contends that defendants are liable under various state tort theories for their unlawful actions. Defendants contend that they are immune from liability.

> It is well established that, in the absence of some special circumstance, claims against a public school district and its officials in their official capacity are barred by sovereign immunity. This immunity applies equally to claims in negligence and in nuisance. School districts and boards are entitled to sovereign immunity, and their employees are entitled to official immunity from personal liability for injuries sustained as a result of the negligent performance of discretionary official acts.[4]

As we indicated in *Gamble v. Ware County Bd. of Ed.*,[5] a state agency may waive its sovereign immunity only through an act of the Legislature which expressly provides for and sets forth the extent of

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[4] (Citations and footnote omitted.) *Crisp County School Dist. v. Pheil*, 231 Ga. App. 139, 140 (1) (498 SE2d 134) (1998). See Ga. Const. of 1983 Art I, Sec. II, Par. IX.

[5] 253 Ga. App. 819 (561 SE2d 837) (2002).

such a waiver.[6] For example, the Georgia Tort Claims Act, OCGA § 50-21-20 et seq., provides for a limited waiver of the state's sovereign immunity for the torts of its officers and employees, however, it expressly excludes school districts or other "local authorities" from the waiver.[7] Accordingly, the trial court properly dismissed Chisolm's tort claims against the Cobb County School District.

Similarly, the trial court was authorized to dismiss Chisolm's tort claims against the employees of the Cobb County School District. As noted above, the doctrine of official immunity "protects individual public agents from personal liability for discretionary actions taken within the scope of their official authority, and done without wilfulness, malice or corruption."[8] A public officer or employee may be held personally liable only for ministerial acts negligently performed or acts performed with malice or intent to injure.[9] "In other words, public agents can only be sued in their official capacities if they (1) negligently perform a ministerial duty, or, (2) act with actual

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[6] Id. at 823 (2) (b).

[7] OCGA §§ 50-21-22 (5); 50-21-23 (a).

[8] (Citation and punctuation omitted.) *Murphy v. Bajjani*, 282 Ga. 197, 198 (1) (647 SE2d 54) (2007).

[9] See *Nichols v. Prather*, 286 Ga. App. 889, 896 (4) (650 SE2d 380) (2007).

malice or actual intent to cause injury while performing a discretionary function."[10]

> A ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. A discretionary act, however, calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed.[11]

The determination of whether an action is discretionary or ministerial must be made on a case-by-case basis.[12] Chisolm contends in his reply brief that defendants negligently performed their ministerial functions "based upon actual malice with actual intent." We cannot agree with Chisolm that decisions by school officials regarding the evaluation, placement, or delivery of educational services to his daughter are ministerial. Such decisions are purely discretionary and must be performed with actual malice to be actionable. "'Actual malice' . . . denotes 'express malice,' i.e., 'a deliberate intention to do

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[10] (Citation omitted.) *Daniels v. Gordon*, 232 Ga. App. 811, 813 (2) (503 SE2d 72) (1998), citing *Teston v. Collins*, 217 Ga. App. 829, 830 (1) (459 SE2d 452) (1995).

[11] (Citation omitted.) *Teston*, supra.

[12] *Crisp County School System v. Brown*, 226 Ga. App. 800, 803 (2) (487 SE2d 512) (1997).

wrong,' and does not include 'implied malice,' i.e., the reckless disregard for the rights or safety of others."[13] Chisolm complains that school officials refused to set up conferences with him, refused to allow him be involved in the PTSA, and failed to place Paris in a specific class per his request, all of which set her up for failure. None of these alleged acts show the malicious, wilful, or wanton conduct necessary to overcome defendants' claim of immunity.

(b) The trial court also properly dismissed Chisolm's discrimination claim. In his complaint, Chisolm alleges that "defendants (sic) conduct is in violation of federal and state statutes which require no distinction be made between people in educational activities. The petition does not state what provisions of the State or Federal Constitution are alleged to be violated. Moreover, as noted by the District Court in its order of dismissal, the complaint makes no reference to 42 USC § 1983.[14] To the extent Chisolm contends that he and Paris were deprived of their rights under §1983 by school officials' failure to comply with OCGA §§ 9-3-33, 20-2-720, and 20-2-751.4, the claim fails. As we have held previously, the violation of a

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[13] (Citation omitted.) *Murphy*, supra at 203 (4).

[14] See, e.g., *Gamble*, supra at 828-829 (6) (trial court properly refused to file complaint which broadly asserted that defendants discriminated against plaintiff and violated his due process and equal protection rights).

state statute cannot provide the basis for a claim under 42 USC § 1983.[15]

(c) Chisolm's remaining allegations against school officials include child cruelty and neglect, violations of OCGA §§ 20-2-720 and 20-2-751.4, and defamation. We address these claims separately, and for the reasons that follow, find that the trial court properly dismissed them.

(i) Child cruelty, OCGA § 16-5-70, is a criminal statute. "The violation of a penal statute does not automatically give rise to a civil cause of action on the part of one who [is] injured thereby."[16] We know of no instance where this Code section has been used to create a private cause of action and Chisolm has not directed us to one.

(ii) OCGA § 20-2-751.4 provides for the adoption of policies addressing bullying of a student by another student. Nothing in Chisolm's complaint can be construed as a claim that Paris was bullied by another student and that defendants failed to adopt policies prohibiting such bullying.

(iii) OCGA § 20-2-720 provides that

> No local school system, whether county, independent, or area, shall have a policy of

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[15] *See Allen v. Bergman*, 201 Ga. App. 781, 783 (3) (b) (412 SE2d 549) (1991).

[16] (Citation and punctuation omitted.) *Rolleston v. Huie*, 198 Ga. App. 49, 50 (2) (400 SE2d 349) (1990).

> denying, or which effectively prevents, the parents of students who are in attendance at or who have been enrolled in any facility within such system the right to inspect and review the education records of their child. A parent shall be entitled to inspect and review only information relating to his or her own child and if any material or document in a child's record includes information on another student, such information regarding any other student shall not be made available for inspection or review except to the parents of that student. Both parents of a child shall be entitled to inspect and review the education records of their child or to be provided information concerning their child's progress. Information concerning a child's education record shall not be withheld from the noncustodial parent unless a court order has specifically removed the right of the noncustodial parent to such information or unless parental rights have been terminated. For purposes of this Code section, "education records" shall include attendance reports and records.

OCGA § 20-2-720 contains no provision creating a private cause of action in favor of a parent denied access to a child's education records.[17] Even assuming

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[17] See, e.g., *Murphy*, supra at 200-201 (2) (penal statute requiring school personnel to report crimes committed by students on school property does not create civil cause of action for damages in favor of victim allegedly harmed by violation of the statute).

the existence of such a private cause of action, however, we know of no authority under which Chisolm can recover monetary damages for such a violation. We find OCGA § 20-2-720 analogous to the Open Records Act, OCGA § 50-18-70 et seq., which permits any citizen of this state to inspect public records of an agency, as defined in OCGA § 50-18-70 (a), except those that are prohibited or exempted from public inspection by law or court order.[18] That Act does not permit recovery of compensatory or punitive damages.[19] In this case, pretermitting whether Chisolm can show a violation of the statute, damages are not an enforcement mechanism.[20]

(iv) Lastly, Chisolm's defamation claim against school officials, primarily defendant Sullivan, also fails. To the extent Chisolm alleges that Sullivan's actions on April 30, 2005, defamed him, this claim is barred by OCGA § 9-3-33, which provides that actions for injuries to reputation must be brought within one year of the date of the alleged defamatory acts. Chisolm's complaint was filed one year and six months after the alleged defamatory act.

To the extent Chisolm's complaint alleges that Sullivan's letter defamed him, such allegation fails as

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[18] OCGA § 50-18-70 (b).

[19] *Wallace v. Greene County*, 274 Ga. App. 776, 781 (2) (618 SE2d 642) (2005).

[20] See, e.g., *McBride v. Wetherington*, 199 Ga. App. 7 (403 SE2d 873) (1991).

a matter of law. In order to recover for libel or slander, a plaintiff must show that the offending statement was "published," or communicated to another person other than the impugned party.[21] In the instant case, there is no claim that the alleged defamatory letter was published to anyone other than Chisolm. Without publication there can be no cause of action for defamation. The trial court did not err in dismissing Chisolm's complaint for failure to state a claim.

Judgment affirmed. Johnson, P. J., and Phipps, J., concur.

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[21] OCGA §§ 51-5-1(b), OCGA § 51-5-3. See also *Fink v. Dodd*, 286 Ga. App. 363, 367-368 (1) (b) (649 SE2d 359) (2007); *Baskin v. Rogers*, 229 Ga. App. 250, 252 (3) (493 SE2d 728) (1997).

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

MARVIN CHISOLM, a single man,	) No.: 06-A-10568-4
Plaintiff,	)
v.	)
KELLY J. SULLIVAN, BEVERLY SHOUN, Principal COHEN, GARY BOLING, KATHRYN JONES, HEATHER MOODY, TARA GAUNTT, TOM DOHRMANN, JOE REDDEN, LINDSEY TIPPEN, CURT JOHNSON, BETTY GRAY, and COBB COUNTY SCHOOL DISTRICT,	)
Defendants.	)

ORDER OF DISMISSAL

(Filed May 21, 2007)

THIS MATTER having come before the Court on Defendants' Motions' to Dismiss, and the Court having read and considered the pleadings, the documents on file and all of the applicable legal authority, this Court finds and concludes as follows:

FINDINGS OF FACT

On October 9, 2006, Marvin Chisolm filed suit against Kelly Sullivan, Beverly Shoun, Principal

Cohen, Gary Boling, Kathryn Jones, Heather Moody, Tara Gauntt, Tom Dohrmann, Joe Redden, Lindsay Tippins, Curt Johnston, Betty Gray and the Cobb County School District. The Plaintiff's civil action was filed in the State Court of Cobb County. The Plaintiff set forth eight (8) causes of action for: Mental Anguish, Neglect, Harassment, Cruelty, Reprisal, Discrimination, Defamation, and Punitive Damages.

Assuming the facts stated in Plaintiffs' Complaint are true, Plaintiff Marvin Chisholm is the parent of a student (hereinafter referred to as "P.A.C.") who was a student at Norton Park Elementary School and Floyd Middle School in the Cobb County School District. (Complaint, ¶ 5). The Plaintiff is bringing the claims in this complaint only on his behalf. The Plaintiff does not set forth any facts in his Complaint which would toll the statute of limitations nor has he raised any issues of tolling in his briefs. There is no allegation that any action of any Defendant was done with actual malice.

Generally, the Plaintiff claims that he was discriminated against, harassed and retaliated against in response to his requests to review his child's educational records, his request to have his child tested for special education services, his request for parent conferences and his request to be involved in the PTA. (Plaintiff's complaint 5, 6.)

Specifically, he claims that on October 15, 2003, that Defendants Shoun, Sullivan, Jones, Gauntt, and Moody refused his request for an evaluation of P.A.C.

Plaintiff further claims that the School District failed to have a conference with the Plaintiff, failed to foster effective communication with the Plaintiff and failed to allow him join the PTA. The foregoing Defendants "did everything in their ability to set up my daughter for failure and to be left behind in limbo." Defendants Dohrmann, Redden, Tippins, Johnston and Gray are alleged to have not exercised "proper judgment and leadership to address my complaint and eradicate the foolishness." The Plaintiff alleges that he filed a grievance with the Cobb County School District, the Georgia Department of Education and the U.S. Department of Civil Rights, after which he was retaliated against.

In 2004-2005, the Plaintiff claims that he withdrew a complaint. (Plaintiff's complaint 7.) He alleges that he was retaliated against when his daughter was not placed in a class "requested by her parents" in order to prepare their daughter for high school.

Finally, he claims that a teacher harassed him on April 30, 2005, when the teacher was "exhibiting herself and a "gentleman" around 2 a.m. outside of a Kinko's. (Plaintiffs complaint 8.) According to the complaint, the teacher subsequently defamed the Plaintiff in a letter to the Plaintiff. (Plaintiff's complaint ¶ 8.) In his Complaint, the Plaintiff never specifies when the allegedly defamatory letter was sent or what the defamatory statement was.

The Defendants removed this case from the State Court of Cobb County on November 13, 2006, based

on the Plaintiff's alleged federal law claims. The Plaintiff's complaint appeared to contain alleged violations of Section 1983 based on discrimination, violation of the Individuals with Disabilities Education Act ("IDEA"), and a violation of the Family Educational Rights and Privacy Act ("FERPA"). (Complaint, ¶¶ 4, 16). On March 19, 2007, the U.S. District Court entered an order dismissing the Plaintiffs federal law claims, remanding the case back to the Cobb County State Court.

On March 23, 2007, the following Defendants filed their Motions to Dismiss Plaintiff's Complaint along with their Answers: Kelly Sullivan, Beverly Shoun, Gary Boling, Heather Moody, Tara Gauntt, Tom Dohrmann, Joe Redden, Lindsay Tippins, Curt Johnston, Betty Gray and the Cobb County School District. Defendants Jones and Cohen filed their Answers along with a Motion to Dismiss Plaintiff's Complaint on April 13, 2007.

On March 27, 2007 and April 19, 2007, the Plaintiff filed a Motion to Strike. The Plaintiff filed a "Response to Cobb County School District's Brief on May 1, 2007.

CONCLUSIONS OF LAW

A. Standard of Review

1. Motion to Dismiss

A motion to dismiss for failure to state a claim upon which relief may be granted if appropriate

under O.C.G.A. § 9-11-12(b)(6) and may be made by motion in writing at the option of the pleader. O.C.G.A. § 9-11-12(b)(6). Defendants Jones and Cohen also filed a motion under O.C.G.A. § 9-11-12(b)(1)(2)(4)&(5). In order to prevail on a motion to dismiss, it must be established that (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof, and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor. *Mooney v. Mooney,* 235 Ga. App. 117, 408 S.E.2d 766 (1998) (citations omitted). Unlike a motion for summary judgment, a motion to dismiss for failure to state a claim is aimed directly at the merits of the claim instead of the consideration of evidence presented. *Williamson v. Perret's Farms, Inc.,* 128 Ga. App. 687, 197 S.E.2d 754 (1973).

B. State Law Claims

1. Failure to Serve Personally Defendants Jones and Cohen Bars a Claim Against Those Defendants

The Plaintiff's complaint is barred because of the failure to serve the complaint and summons upon Defendant Jones or Defendant Cohen. The failure to

serve a complaint subjects the complaint to dismissal. *Sawyer v. Sawyer,* 25.3 Ga. App. 619, 560 S.E.2d 86 (2002). Here, the Plaintiff has failed to ever serve Defendants Jones or Cohen with a complaint and summons. It has been more than 180 days since the Plaintiff filed suit.

The Plaintiff has not presented any evidence that he exercised extraordinary diligence in attempting to serve the Complaint on these Defendants. When a Defendant is not served, and the causes of action are outside of the statute of limitations, it is the Plaintiffs burden to show that he exercised extraordinary diligence in attempting to serve these Defendants. *Duffy v. Lyles, 281 Ga. App. 377, 636 S.E.2d 91 (2006).* The Plaintiff has made no such showing.

As such, Plaintiffs complaint must be dismissed as to Defendants Jones and Cohen.

2. <u>Plaintiff's Complaint Is Dismissed Because of the Lack of Personal Jurisdiction Over Defendant Jones or Cohen.</u>

Because the Plaintiff has failed to serve his complaint on Defendant Jones or Cohen personally, the Court has no personal jurisdiction over these Defendants. *Denny v. Croft,* 195 Ga. App. 871, 395 S.E.2d 72 (1990). Hence, Plaintiff's complaint must be dismissed.

3. Plaintiff's Claims In Court II, III, IV, V and VII Are Barred For Failure to State A Cognizable Claim.

Many of Plaintiffs claims are barred for failure to state a cognizable claim under Georgia law. The Plaintiff has asserted the following causes of actions: Count II – Neglect; Count III – Harassment; Count IV – Cruelty; Count V – Reprisal; and Count VII – Defamation of Character.

In Counts II through V, the Plaintiff has not pled any cognizable claim under Georgia law. There is no cause of action in this jurisdiction for such claims. Further, even if there was a cause of action, he has set forth no facts in his complaint that would lead to any claim for relief. Under Georgia law, while a complaint is not required to set forth a cause of action, it is required to set forth a claim for relief. *Nicholson v. Windham,* 257 Ga. App. 429, 571 S.E.2d 466 (2002). Specifically, there are no facts alleged in his complaint which would show that any Defendant neglected his daughter, harassed the Plaintiff or his daughter, was cruel to his daughter or retaliated against them.

In Count V, Plaintiff has a claim for defamation. Generally, a plaintiff may recover for defamation for any false or malicious publication, not privileged, which intentionally or negligently causes him damage. Here, the alleged conduct set forth in Plaintiff's complaint cannot support a claim for defamation because there is no allegation that this claim was

filed within one year of the accrual of the claim, O.C.G.A. § 9-33-3. Further, Plaintiff claimed that that Defendant Sullivan defamed him in a letter to the Plaintiff. However, this allegation is insufficient to support a claim of defamation because such a defamatory comment must be publicized to a third party. O.C.G.A § 51-5-3; *Sigmon v, Womak,* 158 Ga. App. 47, 279 S.E.2d 254 (1981). Finally, the Plaintiff never states what, if anything, was defamatory about the statement by Defendant Sullivan or anyone else. Overall, the Plaintiff fundamentally fails to set forth any defamation claim, O.C.G.A. § 51-5-1(a). As such, the Plaintiff has not set forth any facts that he has a defamation claim, no matter how his complaint is construed, and this claim must be dismissed.

4. Plaintiff Failed to Properly Plead His Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress Claim.

Construing Plaintiff's Complaint in a light most favorable to the Plaintiff, Paragraph Eleven in Plaintiff's Complaint, which is a claim for mental anguish, could set forth cognizable state tort law claim of intentional infliction of emotional distress and/or negligent infliction of emotional distress under Georgia law. (Complaint, ¶¶ 11). However, even if the Court construed this claim as such, it would be subject to dismissal for failure to properly plead this cause of action.

In order to properly plead an intentional infliction of emotional distress claim under Georgia law, a plaintiff must show that a defendant's actions were terrifying or insulting as naturally to humiliate, embarrass or frighten the plaintiff. *Georgia Power v. Johnson,* 155 Ga. App. 862, 863 (1980). The pleading requirement for a negligent infliction of emotional distress claim is even more stringent. Specifically, a party must show that there was some impact on the plaintiff, and that impact must be a physical injury. *Hall v. Carney,* 236 Ga. App. 172, 174 (1999).

The foregoing state tort law claims against the Defendants as plead in his Complaint clearly fail to meet the above-referenced standards necessary to properly plead claims for intentional infliction of emotional distress and negligent infliction of emotional distress. As such, these claims are dismissed.

5. Plaintiff's Claim for Punitive Damages.

Plaintiff's claim for punitive damages fails against the Defendants because of the application of official and sovereign immunity. (Plaintiff's complaint ¶ 18.) Further, as a matter of public policy, punitive damages are not permitted against a public entity, such as a school district or school employees, *MARTA v. Boswell,* 261 Ga. 427, 427-428, 405 S.E.2d 869 (1991). To be sure, there is no allegation of actual malice, or even recklessness, to warrant the continuation of this claim. For the foregoing reasons, Plaintiff's claims for punitive damages must be dismissed.

6. Statute of limitations defense for state law claims

Plaintiff cannot recover on his state law tort claims because they are either barred by the two-year statute of limitation for personal injury claims or by the one year limitation for defamation claims.

Assuming arguendo that Plaintiff has sufficiently alleged a tort claim, the Plaintiff has set forth no facts in which a tort was committed against him within two years of filing his suit, i.e., October 9, 2004. In general, personal injury claims must be brought within two (2) years after the right of action accrues, except for injuries to reputation, which must be brought within one (1) year. O.C.G.A. § 9-3-33. If such claims are not brought before the statute of limitations expires, they are subject to immediate dismissal. *Bynum v. Fulton-DeKalb Hosp. Auth.*, 267 Ga. App. 899, 600 S.E.2d 623 (2004).

Most of the Plaintiff's tort claims are time barred by the two year statute of limitations as the allegations occurred well before October, 2004. For instance, the Plaintiff claims that on October 15, 2003, some Defendants denied his daughter an evaluation in order to qualify for special education services. (Plaintiff's Complaint, § 6). Assuming any of Plaintiff's allegations are sufficient to assert a claim of relief, those claims are barred by the two (2) year statute of limitations.

6. <u>Official immunity bars Plaintiff's State law Tort Claims Against Individual Defendants.</u>

Plaintiff's causes of action are barred by the doctrine of official immunity. Just as Georgia school districts and boards are entitled to sovereign immunity, their employees are entitled to official immunity from personal liability for injuries sustained as a result of the negligent performance of discretionary official acts. *Crisp County School District v. Pheil,* 231 Ga. App. at 140, citing *Crisp County School System v. Brown,* 226 Ga. App. 800, 802-803 (1997). Plaintiff alleges that the School District Defendants initiated and/or condoned a pattern of neglect and harassment against Plaintiff and his daughter. Plaintiff's state law tort claims include the following: "mental anguish", "neglect", "harassment", "cruelty", "reprisal", and "defamation". (Complaint, §§ 11-16). Assuming arguendo that some of Plaintiff's tort law claims are cognizable, the Plaintiff's complaint contains no allegation that any of the actions were undertaken with any actual malice or that any of the duties were ministerial.

The Georgia Court of Appeals has described the applicability of official immunity as follows:

> Official immunity . . . is applicable to government officials and employees sued in their individual capacities. While official immunity does not apply to purely ministerial duties required by law, public officials are immune from individual liability for

> discretionary acts undertaken in the course of their duties and without willfulness, malice, or corruption. . . . This official immunity is intended to protect public officials in the honest exercise of their judgment, however erroneous or misguided that judgment may be. Otherwise, not only would it be difficult to get reasonable men to fill public office, but there would be constant temptation to yield officially to unlawful demands, lest private liability be asserted and enforced.

Schmidt v. Adams, 211 Ga. App. 156 (1993) (citations omitted).

The question of whether official immunity applies to a particular claim turns on the determination of whether the underlying act, upon which the allegation is based, is "ministerial", that is, required specifically by law, or "discretionary", that is requiring the exercise of judgment or choice on the part of the official. The Court of Appeals has described this application of immunity as follows:

> It is a well established principle that a public official who fails to perform purely ministerial duties required by law is subject to an action for damages by one who is injured by his omission. However, it is equally well established that "where an officer is invested with discretion and is empowered to exercise his judgment in matters brought before him, he is sometimes called a quasi-judicial officer, and when so acting he is usually given immunity from liability to persons who may

> be injured as a result of an erroneous decision; provided the acts complained of are done within the scope of the officer's authority and "*without willfulness, malice or corruption.*" These discretionary acts . . . lie midway between judicial and ministerial ones. The name of the public officer or officers is immaterial and the question depends on the character of the act. If the act done for which recovery is sought is judicial or quasi-judicial in its nature, the officer acting is exempt from liability.

Swofford v. Cooper, 184 Ga. App. 50, 52 (1987).[1]

In Georgia, when determining whether official immunity applies to a particular action, the Court of Appeals has indicated that "[t]he single overriding factor is whether the specific act from which liability allegedly arises is discretionary or ministerial," Id., citing *Shuman v. Dyess,* 175 Ga. App. 213, 216 (1985). This determination is made on a case-by-case basis, Id. Actions are to be reviewed for the purpose of the application of official immunity by analyzing the

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[1] In making the same determination, the Court of Appeals in *Bitterman v. Atkins,* 217 Ga. App. 652, 652 (1995), also added "where public officials are acting within the scope of their duties and exercising a discretionary power, *the courts are not warranted in interfering,* unless fraud or corruption is shown or the power of discretion is being manifestly abused to the oppression of the citizen.: *Id.,* citing, *Sisson v. Douglas County School District,* 181 Ga. App. 77, 79 (1986) (emphasis added).

underlying act of the official. The Court of Appeals has described this process as follows:

> In Georgia the distinction between a ministerial and a discretionary act, and therefore the scope of the immunity granted a public official in any given situation turns upon the specific character of the complained-of act, not the more general nature of the job, Under this standard, it makes no difference that the official is required to perform discretionary acts if the complained-of act is more properly characterized as ministerial. The grant of [official] immunity, then, is really more in the nature of a transitory privilege rooted in the fear that a contrary rule would inhibit the judgment upon which good government rests.

Id. (citations omitted),

Courts have consistently defined ministerial and discretionary acts as follows:

> A ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. A discretionary act, however, calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed.

Kelly v. Lewis, 221 Ga. App, 506, 508 (1996), citing *Joyce v. Van Arsdale,* 196 Ga. App. 95, 96 (1990).

On the basis of official and sovereign immunity, the Plaintiff's tort claims are dismissed.

7. Any Claim Premised on O.C.G.A. 20-2-720 Must Be Dismissed.

Construing Plaintiff's Complaint in a light most favorable to the Plaintiff, the Plaintiff may be attempting to assert a cause of action under O.C.G.A. 20-2-720. However, the plain language of that statute contains no provision creating a private cause of action for a party claiming a violation of it. There is no case law interpreting this statute, which would permit a private cause of action. Thus, the foregoing statute cannot provide a basis for civil liability against the Defendants and any claim based on that statute must be dismissed.

8. Plaintiff's Motions to Strike Are Denied.

Plaintiff's motions to strike are denied because there is no legal or factual basis for this motion and his motions are moot. O.C.G.A. § 9-11-12(f) provides that "the court may order strike from any pleading, any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." There is nothing contained in Defendants' Motions to dismiss which could qualify as material to be stricken.

Further, the Court has dismissed Plaintiff's Complaint and his Motions to Strike are now moot.

NOW THEREFORE, IT IS HEREBY ORDERED that the Defendants' Motions to Dismiss are **GRANTED**, and Plaintiff's Complaint is hereby dismissed.

SO ORDERED this 21 day of May, 2007.

/s/ Kathryn J. Tanksley
The Honorable
Kathryn J. Tanksley
Judge, State Court of
Cobb County
Cobb Judicial Circuit

Order prepared by:

/s/ Randall C. Farmer
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[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARVIN CHISOLM,

Plaintiff,

v.

KELLY J. SULLIVAN, ET AL.,

Defendants.

CIVIL ACTION FILE

NO. 1:06-CV-2767-BBM

ORDER

This action is before the court on the Motion to Dismiss [Doc. No. 3] filed by Kelly J. Sullivan, Beverly Shoun, Gary Boling, Kathryn Jones, Heather Moody, Tara Gauntt, Tom Dohrmann, Joe Redden, Lindsey Tippins, Curt Johnston, and Betty Gray ("School District Defendants"); the Motion to Dismiss [Doc. No. 4] filed by the Cobb County School District ("Cobb County"); the Motion for Summary Judgment filed by plaintiff Marvin Chisolm ("Mr. Chisolm") [Doc. No. 6]; and the Motion to Strike Various Filings by Mr. Chisolm [Doc. No. 18] filed by Cobb County and the School District Defendants ("defendants").

I. Factual and Procedural Background

On a motion to dismiss, the court accepts as true all factual allegations set out in the plaintiff's complaint. *See Lotierzo v. Woman's World Med. Ctr., Inc.*, 278 F.3d 1180, 1182 (11th Cir. 2002). Therefore,

except as otherwise noted, the following facts are taken from Mr. Chisolm's Complaint. As such, they do not constitute findings of fact by the court.

Mr. Chisolm is the father of Paris A. Chisolm ("Ms. Chisolm"), a student who attended Norton Park Elementary School and Floyd Middle School in the Cobb County School District, from October 3, 1997 through 2005. During this time, Mr. Chisolm was denied access to review school records, report cards, and progress reports pertaining to Ms. Chisolm. On October 15, 2003, Mr. Chisolm requested a full evaluation of Ms. Chisolm to "rule out" a learning disorder. (Compl. ¶ 6.) Mr. Chisolm's request was denied. Thereafter, Mr. Chisolm complained to the State Department of Education, the United States Department of Education Civil Rights Office, and elected officials. From 2004-2005, Mr. Chisolm withdrew his complaints while waiting to see if Floyd Middle School would place his daughter in special classes for reading and writing. Floyd Middle School did not do so. Mr. Chisolm also states that he was "harass[ed]" off of school grounds by a teacher, Ms. Kelly Sullivan. (Compl. ¶ 8.)

On October 9, 2006, Mr. Chisolm filed this action in the State Court of Cobb County against Cobb County and the School District Defendants alleging discrimination under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504"), violations of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA"), violations of the No Child Left Behind Act, 20 U.S.C. § 6301 *et seq.*

("NCLB"), violations of parental rights under O.C.G.A. § 20-2-720, and various state claims including mental anguish, neglect, cruelty, reprisal, and defamation. Mr. Chisolm seeks $12,000,000 in general and special damages and punitive damages of $2,000,000.

II. Discussion

A. Motions to Dismiss

Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") provides for the dismissal of an action when a complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In general, a complaint should be dismissed under Rule 12(b)(6) only when it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *see Theoharous v. Fong,* 256 F.3d 1219, 1224 (11th Cir. 2001). Accordingly, all facts that Mr. Chisolm has pleaded in his Complaint are accepted as true, and all "reasonable inferences therefrom are construed in the light most favorable to [him]." *Bryant v. Avado Brands, Inc.,* 187 F.3d 1271, 1274 n.1 (11th Cir. 1999). However, "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Aldana v. Del Monte Fresh Produce, N.A., Inc.,* 416 F.3d 1242, 1246 (11th Cir. 2005) (internal quotations and citation omitted).

1. IDEA Claims

The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living." 20 U.S.C. § 1400(d)(1)(A). The statute permits plaintiffs to seek "remedies available under the Constitution, [Section 504], or other Federal laws protecting the rights of children with disabilities." 20 U.S.C. § 1415(1). Under the IDEA, state and local education agencies must identify children with disabilities and develop an annual Individualized Education Program ("IEP") for each child. 20 U.S.C. § 1414.[1] Mr. Chisolm argues that his daughter was not properly classified and treated under this Act.

In order to bring a claim in federal court under the IDEA, the aggrieved party must first exhaust the administrative remedies available to him or her under the statute. *N.B. v. Alachua County Sch. Bd.*, 84 F.3d 1376, 1378 (11th Cir. 1996); 20 U.S.C. § 1415(1). The Eleventh Circuit has held "any student who wants relief that is available under the IDEA must use the IDEA's administrative system, even if

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[1] The IEP is a comprehensive document developed by a team made up of parents, teachers, and other school administrators outlining the goals of the child, and the special education and related services needed to meet those goals. 20 U.S.C. § 1414(d).

he [or she] invokes a different statute." *M.T.V. v. DeKalb County Sch. Dist.*, 446 F.3d 1153, 1158 (11th Cir. 2006) (internal quotations and citations omitted). Indeed, the "philosophy of the IDEA is that plaintiffs are required to utilize the elaborate administrative scheme established by the IDEA before resorting to the courts to challenge the actions of the local school authorities." *N.B.*, 84 F.3d at 1378 (internal quotations and citations omitted). However, a plaintiff is not required to exhaust his administrative remedies when resorting to those remedies would be futile or inadequate. *Id.* at 1379.

Under the IDEA, parents seeking a remedy must first request "an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(f)(1)(A). In Georgia, the Office of State Administrative Hearings conducts such hearings. O.C.G.A. § 50-13-41(a)(1). If parents are dissatisfied with the administrative decision, they can then bring a civil action in either state or federal court. 20 U.S.C. § 1415(i)(2)(A).

In this case, Mr. Chisolm has neither asserted that he has exhausted his administrative remedies, nor alleged facts indicating that pursuit of such remedies would be futile or inadequate. Mr. Chisolm mentions that he used a "grievance procedure[ ] (complaint) to upper echelon leadership, State Department of Education, and the US Department of Education civil rights office, and elected officials,"

(Compl. ¶ 6) but subsequently withdrew his complaints. Mr. Chisolm has set forth no facts indicating that he appeared before or received a ruling from the Georgia Office of State Administrative Hearings. Therefore, Mr. Chisolm has not exhausted the "administrative scheme established by the IDEA before resorting to the courts to challenge the actions of the local school authorities." *N.B.*, 84 F.3d at 1378 (internal quotations and citations omitted). As set forth above, neither has Mr. Chisolm pleaded facts indicating that pursuit of his claim in the administrative system of the state of Georgia would be "futile" or "inadequate." *N.B.*, 84 F.3d at 1379.

Based upon this record, Mr. Chisolm has failed to state a claim upon which relief may be granted; therefore, defendants' Motions to Dismiss as they pertain to Mr. Chisolm's IDEA claims are GRANTED.

2. Section 504 of Rehabilitation Act of 1973 Claims

Section 504 of the Rehabilitation Act provides, in relevant part, that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." 29 U.S.C. § 794(a). Because Mr. Chisolm refers to Section 504 of the Rehabilitation Act in his Complaint and other pleadings, the

court will analyze his general claim of "discrimination" pursuant to this statute.[2]

The Eleventh Circuit has repeatedly held "'claims asserted under Section 504 and/or the ADA are subject to Section 1415(f)'s requirement that litigants exhaust the IDEA's administrative procedures to obtain relief that is available under the IDEA before bringing suit under Section 504 and/or the ADA.'" *M.T.V.*, 446 F.3d at 1158 (quoting *Babicz by v. School Bd.*, 135 F.3d 1420, 1422 n.10 (11th Cir. 1998)). Therefore, the court's analysis *supra* section II.A.1. is equally applicable here. As such, defendants' Motions to Dismiss as to this claim are GRANTED.

3. NCLB Claims

Mr. Chisolm alleges that defendants violated his right of "parental involvement" under the NCLB. (Compl. 4.) Whether Mr. Chisolm's NCLB claims are brought pursuant to 42 U.S.C. § 1983 or under an implied private right of action, the court must first "determine whether Congress *intended to create a federal right*," or "intended to confer individual rights

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[2] Defendants interpreted Mr. Chisolm's discrimination claim as a claim under 42 U.S.C. § 1983. However, Mr. Chisolm's complaint and subsequent motions make no reference to 42 U.S.C. § 1983. Rather, they reference the Section 504. Because "the plaintiff is the master of the complaint" this court will analyze Mr. Chisolm's discrimination claim pursuant to the Section 504, as pleaded. *See, e.g., Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002).

upon a class of beneficiaries" in order to entertain the case. *Gonzaga Univ. v. Doe,* 536 U.S. 273, 283, 285 (2002). Indeed, the Eleventh Circuit has never recognized that the NCLB creates an individual right or private cause of action.

Neither does this court read the NCLB to indicate an intention by Congress to create a private cause of action enforceable in a court of law or an individual right. *See Alliance for Children, Inc. v. City of Detroit Publ. Sch.,* ___ F. Supp. 2d ___, No. 06-15021, 2007 WL 576047, at *7 (E.D. Mich. Feb. 15, 2007); *see also Fresh Start Acad. v. Toledo Bd. of Educ.,* 363 F. Supp. 2d 910, 916 (N.D. Ohio 2005); *Ass'n of Cmty. Orgs. for Reform Now v. New York City Dep't of Educ.,* 269 F. Supp. 2d 338, 347 (S.D.N.Y 2003). Rather, the court is aware that when Congress enacts legislation pursuant to its spending power, "the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 28 (1981).

Particularly when Congress codifies an enforcement scheme, such as that of the NCLB, "[i]t is implausible to presume that the same Congress nonetheless intended private suits to be brought before thousands of federal- and state-court judges, which could only result in the sort of 'multiple interpretations' the Act explicitly sought to avoid." *Gonzaga,* 536 U.S. at 290 (discussing the Family

Educational Rights and Privacy Act, 20 U.S.C. § 1232g, *et al.* ("FERPA")). Likewise, if Congress seeks to create new rights enforceable under 42 U.S.C. § 1983, "it must do so in clear and unambiguous terms – no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action." *Id.*

Because the NCLB does not create a private cause of action or create individual rights, Mr. Chisolm can prove no set of facts that would entitle him to relief in this court under this statute; therefore, defendants' Motions to Dismiss as to this claim are GRANTED.

4. State Law Claims

In his complaint, Mr. Chisolm also raises several claims under Georgia state law. Specifically, he alleges a violation of O.C.G.A. § 20-22-720 for defendants' failure to render Ms. Chisolm's educational records to him.[3] Mr. Chisolm's other claims under Georgia law include: mental anguish, neglect, harassment, cruelty, reprisal, and defamation.

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[3] Instead of addressing Mr. Chisolm's claim under O.C.G.A. § 20-22-720, defendants interpreted Mr. Chisolm's failure to turn over educational records claim as one under FERPA. Again, the plaintiff is the master of his complaint, and it is up to him to decide what law he intends to rely upon. *Holmes Group,* 535 U.S. at 830-31. Since Mr. Chisolm seeks relief under O.C.G.A. § 20-22-720, the court will not construe this claim under FERPA.

Although the district court has discretion to retain jurisdiction over a remaining state claim once federal claims have been dismissed, "federal courts have been encouraged to dismiss pendent state claims if all federal claims are resolved." *Rutledge v. Aluminum, Brick & Clay Workers Int'l Union,* 737 F.2d 965, 970 (11th Cir. 1984). Having been directed to no Georgia case law interpreting O.C.G.A. § 20-22-720, and finding none on its own, the court finds that this is a particularly inopportune case in which to exercise discretionary jurisdiction. Therefore, the court chooses not to exercise jurisdiction over Mr. Chisolm's remaining state claims and will DENY defendants' Motions to Dismiss on the state claims. Accordingly, all state law claims are to be REMANDED to state court.

B. Motion for Summary Judgment and Motion to Strike

Because this court has GRANTED IN PART the defendants' Motions to Dismiss and is remanding Mr. Chisolm's remaining claims to state court, the Motion for Summary Judgment filed by Mr. Chisolm [Doc. No. 6] and the Motion to Strike Various Filings by Mr. Chisolm [Doc. No. 18] filed by defendants are each DENIED AS MOOT.

III. Summary

For the forgoing [sic] reasons, the Motion to Dismiss [Doc. No. 3] filed by the School District

Defendants and the Motion to Dismiss [Doc. No. 4] filed by Cobb County are GRANTED as to all claims asserted pursuant to federal law, and DENIED as to Mr. Chisolm's state law claims. Mr. Chisolm's Motion for Summary Judgment [Doc. No. 6] and the defendants' Motion to Strike Various Filings by Mr. Chisolm [Doc. No. 18] are each DENIED AS MOOT. The remaining state law claims are REMANDED to the State Court of Cobb County, Georgia.

IT IS SO ORDERED, this 19th day of March, 2007.

s/ Beverly B. Martin
BEVERLY B. MARTIN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARVIN CHISOLM, Plaintiff, v. KELLY J. SULLIVAN, ET AL., Defendants.	CIVIL ACTION FILE NO. 1:06-CV-2767-BBM

ORDER

This action is before the court on the Motion to Remand [Doc. No. 2] filed by plaintiff Marvin Chisolm ("Mr. Chisolm"); the Motion to Compel [Doc. No. 18] filed by Mr. Chisolm; and the Motion to Stay Plaintiff's Discovery Requests and Motion to Strike Plaintiff's Motion to Compel [Doc. No. 25] filed by defendants.[1] There are a number of other substantive motions pending in this action, which will be considered by the court in a later Order.

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[1] The defendants are the Cobb County School District; nine current or former employees of the Cobb County School District: Kelly J. Sullivan, Beverly Shoun, Principal Cohen, Gary Boling, Kathryn Jones, Heather Moody, Tara Gauntt, Tom Dohrmann and Joe Redden; and members of the Cobb County Board of Education: Lindsey Tippen, Curt Johnston and Betty Gray.

DISCUSSION

Motion to Remand

Mr. Chisolm originally filed this action in the State Court of Cobb County. In his complaint, he mentions two specific federal statutes: the "No Child Left Behind" Act, and IDEA,[2] (Compl. ¶ 4) and he refers to federal statutes which "require no discrimination be made between people." (*Id.* ¶ 16.) It is based upon Mr. Chisolm's mention of these statues that the defendants removed this action to this court, asserting federal question jurisdiction.

It is not clear to the court what relief Mr. Chisolm is seeking under these federal statutes, particularly in light of the fact that he sets forth his "Causes of Action" as (1) mental anguish; (2) neglect; (3) harassment; (4) cruelty; (5) reprisal; (6) discrimination ("In committing the acts alleged herein, defendants conduct is in violation of federal and state statutes which require no distinction be made between people in educational activities.") (*Id.*); (7) defamation of character; and (8) punitive damages. In his prayer for relief, Mr. Chisolm seeks $12,000,000 in general and special damages; $2,000,000 in punitive damages; his costs; and such other relief deemed just by the court. Of course, the plaintiff is the master of his complaint, and it is up to him to decide what law he intends to rely upon. *See, e.g., Holmes Group, Inc. v. Vornado Air*

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[2] The court assumes that Mr. Chisolm is referring to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400.

Circulation Sys., Inc., 535 U.S. 826, 830 (2002). Ultimately, because Mr. Chisolm has made mention of several federal laws, the court gathers he is seeking relief under these laws, and will DENY Mr. Chisolm's Motion to Remand [Doc. No. 2].

Motion to Compel

All defendants have filed motions seeking to have Mr. Chisolm's complaint dismissed, for failure to state a cause of action for which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). By their motion to stay Mr. Chisolm's discovery requests, they have asked this court to stay discovery until such time as the court can evaluate their Motions to Dismiss on the merits. Defendants also seek to have Mr. Chisolm's Motion to Compel discovery denied,[3] because it is untimely, and because they believe this case should be dismissed on the merits.

Defendants filed their Motion for Stay on January 30, 2007. Mr. Chisolm has not responded to or

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[3] Actually, plaintiffs seek to have this court strike Mr. Chisolm's Motion to Compel. However, motions to strike are not favored in this Circuit, and the court will therefore rule on the merits of the Motion. *See, e.g., Somerset Pharm., Inc. v. Kimball*, 168 F.R.D. 69, 71 (M.D. Fla. 1996) ("Motions to strike on the grounds of insufficiency, immateriality, irrelevancy, and redundancy are not favored, often being considered 'time wasters,' and will usually be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties.") (citation omitted).

otherwise opposed such motion since that date. *See* LR 7.1B, N.D. Ga. ("Failure to file a response [to a motion] shall indicate that there is no opposition to the motion.").

This court is given broad discretion in managing pretrial activities in a case. *Chrysler Inf I Corp. v. Chemaly,* 280 F.3d 1358, 1360 (11th Cir. 2002). The court would like to evaluate the Motions to Dismiss filed by defendants in this action prior to the parties undertaking discovery. Accordingly, Mr. Chisolm's Motion to Compel [Doc. No. 21] is DENIED. While the court will not strike Mr. Chisolm's Motion to Compel, it will stay his discovery requests; therefore defendants' Motion seeking such relief [Doc. No. 25] is GRANTED IN PART, AND DENIED IN PART.

SUMMARY

Mr. Chisolm's Motion to Remand [Doc. No. 2] is DENIED. Defendants' Motion to Stay Discovery [Doc. No. 25] is GRANTED, however, Defendants' Motion to Strike is DENIED. Mr. Chisolm's Motion to Compel Discovery [Doc. No. 21] is DENIED.

IT IS SO ORDERED, this 20th day of February, 2007.

s/ Beverly B. Martin
BEVERLY B. MARTIN
UNITED STATES
DISTRICT JUDGE

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

MARVIN CHISOLM, a single man, Plaintiff, VS. KELLY J. SULLIVAN, BEVERLY SHOUN, PRINCIPAL COHEN, GARY BOLING, KATHRYN JONES, HEATHER MOODY, TARA GAUNTT, TOM DOHRMANN, JOE REDDEN, LINDSEY TIPPEN, CURT JOHNSON, BETTY GRAY, and COBB COUNTY SCHOOL DISTRICT, Defendants.	CIVIL ACTION FILE NO. 06-A-10568-4

ORDER

(Filed Jul. 9, 2007)

This case is before the Court on Defendants' Motion to Dismiss Appeal based on Plaintiff's request to proceed in forma pauperis.

As Plaintiff has now paid the costs related to the appeal of this matter, Defendants' motion is hereby denied.

SO ORDERED, this 9th day of July, 2007.

/s/ Kathryn J. Tanksley
Kathryn J. Tanksley, Judge
State Court of Cobb County

[SEAL] **SUPREME COURT OF GEORGIA**
Case No. S08C1099

Atlanta June 12, 2008

The Honorable Supreme Court met pursuant to adjournment. The following order was passed.

MARVIN CHISOLM v. LINDSEY TIPPENS et al.

Your request for an extension of time to file the Motion for Reconsideration in the above case is granted. You are given an extension until June 16, 2008, to file. Failure to do so will subject you to the sanctions of Rules 7 and 10 of this Court.

A copy of this order MUST be attached as an exhibit to the document for which you received this extension.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

[SEAL]

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Jeanette Eidson, Deputy Clerk

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

Date: June 02, 2008

Marvin Chisolm
P.O. Box 673634
Marietta, GA 30006

Case No. S08C1099

MARVIN CHISOLM v. LINDSEY TIPPENS et al.

COURT OF APPEALS CASE NO. A07A2356

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Hines, J., not participating.

Therese S. Barnes, Clerk

SUPREME COURT OF GEORGIA

Case No. S08C1099 Atlanta, June 30, 2008

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

MARVIN CHISOLM v. LINDSEY TIPPENS et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Hines, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Therese S. Barnes, Clerk

IN THE COURT OF APPEALS
STATE OF GEORGIA

MARVIN CHISOLM, a single man	)	
Appellant	)	
v.	)	APPEAL CASE NUMBER A07A2356
LINDSEY TIPPENS, et al	)	
Appellees	)	

MOTION FOR RECONSIDERATION

PART I: STATEMENT OF THE CASE AND FACTS

A. STATEMENT OF THE CASE

On February 5, 2008 the Court of Appeals rendered its opinion in this case, stating "the state court did not err in dismissing Chisolm's complaint for failure to state a claim". Pursuant to Court of Appeals of the State of Georgia rule 37, a motion for reconsideration will be granted only when it appears that the Court overlooked a material fact in the record, a statute or a decision which is controlling as authority and which would require a different judgment from that rendered, or has erroneously construed or misapplied a provision of law or a controlling authority.

A summary judgment in favor of the appellant should have been made by the state court based on the merits of the case, preponderance of evidence, and a genuine issue of material fact. The appellees school

board members and school district officials utilized their human intelligence to 'complicate matters' and deliberately cause injury while performing their ministerial duty with actual malice directed toward appellant and his daughter for 10 years. The appellees did not have to exercise personal deliberation and judgment upon the requests of the appellant *the appellees only needed to act upon the "simple"* ***documented*** *requests of the appellant parent.* The deliberate negligence of the appellees to perform ministerial acts, make the appellant parent's simple matters (requests) 'complex', defamed the appellant and injured his reputation, and establish discriminatory policies with actual malice are violations under 14th Amendment of the Constitution, 42 USC 1983, and Ga. Constitution 1983; and under the doctrine of respondeat superior, superintendents, assistant superintendents, and principals are accountable for the actions of their employees. The appellees actual malice acts are under the "color of law", injured, and deprived the appellant and his daughter of the rights, privileges, or immunities secured by the Constitution and laws, appellees shall be liable to the injured party. R1-674, Supplemental Record 1-25, **R18**, Exhibit A-H, OCGA 51-5-1, *Seay v. Cleveland,* 270 Ga. 64, 65(1) n. 1, 508 S.E.2d 159 (1998), Appellant Brief, Appellant Reply Brief.

B. STATEMENT OF THE FACTS

Appellant was denied access to review school daughter's school records from October 3, 1997 to

November 2006. During school year 2004-2005 Mr. Chisolm was provided school website information during summer vacation as a result of complaint to U.S. Department of Education Civil Rights Office after denied access and not informed of the website for 2 years which keep students and parents informed on all of the "middle school matters". Appellees were placed on probation by appellant, appellant 'withdrew complaint to continue investigation and see how school would conduct themselves'. "School failed test. Received reprisal, daughter left behind by not being placed in a reading and writing class as requested by parents prior to school year". "2005-2006 Osborne High School allowed Mr. Chisolm to participate in parental activities. However, the teachers were cautious of Mr. Chisolm and the damage is done, daughter is left behind in her studies and not doing well; Mr. Chisolm's reputation is ruined and the relationship is strained at Osborne High School because of the complications, hearsay, and libel from Floyd Middle School. 2006-2007 October 9, 2006 Mr. Chisolm filed instant action in the State Court of Cobb County; weeks later Mr. Chisolm was allowed to review daughter's records after 9 years; and was provided access to I Parent an online report of student's attendance, grades, weekly quiz/test scores, progress reports, and class grade scores after being denied access for 3 years after I Parent inception.

PART II A: ENUMERATION ERROR 1

THE STATE COURT COMMITTED REVERSIBLE ERROR BY GRANTING THE APPELLEES' MOTION TO DISMISS WHICH WILL ENABLE CORRUPTION AND WRONGDOING TO CONTINUE IN THE SCHOOL DISTRICT AND RESULTED IN DENIAL OF MOTION FOR SUMMARY JUDGMENT. R656-662.

ENUMERATION ERROR 2

THE STATE COURT COMMITTED REVERSIBLE ERROR BY DISMISSING THE APPELLANTS' COMPLAINT. THE DISMISSAL SENDS A MESSAGE THAT THE STATE COURT CONDONED THE 9.5 YEARS OF MALICIOUS CHILD NEGLECT AND CRUELTY, AND DISCRIMINATION AND HARASSMENT PERPETRATED AGAINST AN INVOLVED, CARING, AND SUPPORTIVE PARENT AND AN HONORABLY DISCHARGED ARMY RETIREE DISABLED VETERAN. R656-662

ENUMERATION ERROR 3

THE STATE COURT COMMITTED REVERSIBLE ERROR BY GRANTING APPELLEES' MOTION TO DISMISS BY ALLOWING AN ORDER BE DRAFTED BY APPELLEES' ATTORNEY AGENT WHICH DISALLOWED DISCOVERY TO COVERUP APPELLEES' CORRUPTION AND WRONGDOING; AND SENDS AN UNINTENTIONAL MESSAGE OF STATE AND COUNTY COLLUSION. R656-662.

PART II B: JURISDICTIONAL STATEMENT

This appeal is from correcting State Court errors of law resulting in dismissal of complaint and denial of motion for summary judgment. Article 6, Section 5, Paragraph 3 of the Georgia Constitution provides that the role of the Court of Appeals is to "correcting lower Court errors of law" and from a final judgment no longer pending in State Court. *Sturdy v. State,* 192 Ga. App.71, 383 S.E.2d 632 (1989) OCGA 5-6-34 (a) (1).

PART III: ARGUMENT AND CITATION OF AUTHORITY

There is evidence and appellant will introduce evidence sufficient to produce a genuine issue of material fact to warrant a grant of the relief sought on the merit of the complaint. Appellant can prove a set of facts in support of claim based upon simple requested ministerial action of the appellees for a long period of time. The appellees deliberately failed to act and perform their ministerial duty. And, with actual malice, setup appellant and his daughter to deliberately inflict injury. The facts and evidence support the claim. *Jones v. Francis Wood Wilson., Inc.,* 119 Ga. App. 28, 165 S.E. 2d 882 (1969). Indeed, the appellees did not cooperate with discovery and did not prepare evidence in opposition to and could not deal with pro se Mr. Chisolm's motion for summary judgment with affidavit and discovery. One way or the other the appellees will be legally held accountable by God,

man, woman, and child for their **expressed malice** toward the appellant and his daughter **for 9.5 years**.

Appellant filed instant action with the State Court. Appellees filed motion to remove to District Court. Appellant file motion to remand to State court thereby placing the case in a limbo between state and federal jurisdiction that ***was not litigated by trial***. "The circuit court in the county to which the lawsuit was transferred did not err in reconsidering the defendants' motion for summary judgment and granting it because nothing limits the number of times a party may make a motion for summary judgment and *res judicata does not apply to a denial of a motion for summary judgment.*" *Hubbard v. DOT,* 256 Ga. App. 342, 568 S.E.2d 559 (2002) Therefore, appellant was in legal right to file the motion for summary judgment with the court he filed the complaint. In the case of pro se *Bradley v. Ga. Institute of Technology, 228* Ga. App. 216, 217 (1) 491 SE2d 453 (1997) the district and state courts granted summary judgments to the defendants. Based upon the opinion of the state court, and no mention of it, plaintiff pro se Bradley did not file a motion for summary judgment in the federal lawsuit nor with the state court; which is non-applicable to plaintiff who filed simultaneous summary judgments in state and federal jurisdiction based upon defendants' motion to remove to district court and plaintiff's motion to remand to state court, plaintiff was able to have the federal law claims reconsidered in state court. OCGA 9-12-40.

Based on the merits of the case, the preponderance of the evidence, and a genuine issue of material fact; the enumeration of errors are explicit, precise, and unmistakable. But, a degree of generality may be tolerated. *MacDonald v. MacDonald*, 156 GA. App. 565, 275 S.E.2d 142 (1980). OCGA 5-6-40.

1. With power come arrogance, corruption, and wrongdoing as indicated in the Record and Supplemental Record and evidenced by the appellees' deliberately with actual malice complicating "simple" requested acts and not taking appropriate ministerial action.

2. The appellees deliberate actual malice wrongdoing was to intentionally inflict injury to hurt Mr. Chisolm and his daughter; was reprisal against Mr. Chisolm for filing complaints to respondeat superiors, and state and federal officials/agencies, to hold appellees accountable to do their ministerial duty, and to provide help to enable his daughter to do well in school enroute to becoming a productive contributor in society. The wrongdoing and corruption of actual malice is based upon an arrogant mindset of the appellees via the pleasure of sovereign and official immunity as being above the law. The appellees with the guidance of their corrupt agent attorney abused the enjoyment of sovereign and official immunity to deliberately express malice neglect, cruelty, discrimination, and harassment; and established discriminatory actual malice school board/district policies to deliberately hurt Mr. Chisolm and his daughter. The appellees failed to act as a reasonable and prudent

person would act to perform his or her ministerial duty in similar circumstances. OCGA 20-2-59

3. The intent of sovereign immunity extended to school districts and boards under the 1991 amendment of Ga. Cons. 1983 Art. 1, Sec. 11 Para IX and no record of a waiver for immunity is to allow the school district employees to perform their **appropriate conduct** ministerial and discretionary duties without fear of a lawsuit. By their inappropiate and actual malice conduct, all the appellees and their agent attorney are immature and irresponsible with the privilege and rights of sovereign immunity. Based on the appellees' historical background and pattern of misconduct, whenever county school officials are naughty and get caught with their hands in the cookie jar they go into "silent damage control mode" and be invisible; and are shuffled like a deck of cards and closely monitored within the school district; to maintain, keep, and coverup, their 'Peyton Place' wrongdoing and scandals. Like Adam and Eve the cobb county school board and school district employees are wearing . . . the fig leaves. However, in this case 'spare the rod spoil the child' – like Adam and Eve the appellees are accountable for being under the color of the law; by depriving others of their rights and failure to perform their own ministerial functions (job-duty); appellees are liable for injuries and damages when they act with actual malice or actual intent to cause injury in the performance of their official functions as perpetrated against Mr. Chisolm and his daughter for 9.5 years on "simple matters".

42 USC 1983; 1983 Ga. Const., Art. 1, Sec. II, Par. IX; *Cameron v. Lang*, 274 Ga. 122, 123(1), 549 S.E.2d 341 (2001); *Id.* at 514, 499 S.E.2d 416 *West's Ga. Const.* Art. 1 & 2, Par. 9(d); *Gilbert v. Richardson,* 264 Ga. 744, 452 S.E.2d 476 (1994) OCGA 33-24-51; *Seay v. Cleveland,* 270 Ga. 64, 65(1), 508 S.E.2d 159 (1998) accord.

The conditions that existed are Mr. Chisolm's daughter has a medical condition proven to exist, and based upon her proven failing grades, below standard grade point average, and inability to focus on her studies, parent Mr. Chisolm took appropriate action to respectfully request the school officials to merely take the required simple ministerial act to help his daughter do well in school. *Miree v. United States,* 409, F. Supp. 768 (N.D. Ga. 1980). Since the initial request 4.2 years ago – October 2003 appellees with actual malice and negligence failed to perform their ministerial duties to act upon the request. *Lincoln County v. Edmond,* 231 Ga. App. 871, 501 S.E.2d 38 (1998).

A libel is a false and malicious defamation of another, expressed in print, writing, pictures, or signs, tending to injure the reputation of the person and exposing him (her) to public hatred, contempt, or ridicule. Indeed, ***respondeat superior*** appellee Tom Dohrmann the **"poster child"** mastermind in his position as assistant superintendent who 'pulled the strings' like the puppet master Gepeto; and manipulated his subordinate employees at Floyd Middle School from his perch at 514 Glover Street, Marietta

Georgia; with actual malice, a deliberate intention to do a wrongful act because of h[illegible] racist mindset in concert and collusion with ***respondeat superior*** appellee principal Gary Boling and ***respondeat superior*** appellee senior guidance counselor Beverly Shoun whom refused to acquiesce Mr. Chisolm's request for help on several occasions during October and November 2003 for his daughter and to schedule a meeting to facilitate an effective relationship with the school in the best interest of the child. And, approximately 2005-2006 school year or thereafter appellee Dohrmann became employed in the position of superintendent of the Oconee County school District, Watkinsville, Georgia.

Indeed, November 2006 appellee Dohrmann with actual malice fabricated a false statement regarding appellant Mr. Chisolm and communicated the statement to an Oconee County notary public and in the State Court at Cobb County where Mr. Chisolm is a resident in response to Mr. Chisolm's instant action. Indeed, appellee employee Kelly Sullivan made the choice to participate in actual malice by "playing the role" as orchestrated by respondaeat superior apellees principal Boling and senior guidance counselor Shoun under the auspices of respondeat superior Dohrmann in an attempt "to setup" Mr. Chisolm to take a fall. On May 3, 2005 appellee employee Sullivan with actual malice signed a fabricated false statement regarding the appellant Mr. Chisolm and communicated the statement to ***respondeat superiors*** and deceptively mailed the letter to Mr. Chisolm. It

appear that appellee employee Sullivan under the auspices of her respondeat superiors and school district attorney agent particpated in actual malice libel and defamation of Mr. Chisolm's character in response to Mr. Chisolm addressing appellee employee Sullivan's misconduct. The only logical reason appellee Sullivan would respond and sign a false and malicious statement is she was instructed or ordered do so by her respondeat superiors and/or the school district attorney agent. As a city of Marietta, Cobb County, and Georgia resident; Mr. Chisolm suffered injury to his reputation and is under constant scrutiny in the community as a result of the conspiracy. OCGA 51-5-1; *McCravy v. Schneer's,* 47 Ga. App. 703, 171 S.E. 391 (1933); *Nelson v. Wainwright*, 223 Ga. 429, 156 S.E.2d 82 (1967); *Floyd v. Atlanta Newspapers Inc.,* 102 Ga. App. 840, 117 S.E.2d 906 (1960); *Rosanova v. Playboy Enters., Inc.,* 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978); *Jones v. Neighbor Newspapers. Inc.,* 142 Ga. App. 365, 236 S.E.2d 23 (1977); **R18, Exhibit A-H**; *Battle v. Seago,* 208 Ga. App. 516, 517 (431 SE2d 148) (1993); *Evans v. City of Atlanta,* 189 Ga. App. 566, 567 (377 SE2d 31) (1988); *Goldrush II v. City of Marietta,* 267 Ga. 683, 695 (8) (482 SE2d 347) (197); OCGA 51-5-1; OCGA 51-5-3; *Sigmon v. Womack,* 158 Ga. App. 47, 279 S.E.2d 254 (1981); *Garren v. Southland Corp.,* 235 Ga 784, 221 S.E.2d 571 (1976)

Appellant's Motion to Compel Discovery, Appellee's Motion to Stay Discovery and Strike Motion to Compel, **Affidavit of Marvin Chisolm** filed in

District Court, Memorandum of Law in Support of Motion to Compel, Apellant's Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment, Notice of Also Filing Motion and Memorandum for Summary Judgment, **Statement of Undisputed Material Facts, Affidavit of Marvin Chisolm in Support of Motion for Summary Judgment** reveal in the record there is an absence of evidence to support the appellees case and the appellees cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue. Supplemental Record 11-25, R71-78, R91-111

Official immunity protects individual public agents from personal liability for discretionary actions taken within the scope of their official authority, and done without willfulness, malice, or corruption. The evidence in the record is insurmountable against the cobb county school district appellees employees, respondeat superiors, the hierarchy board policy makers, and their attorney agent. Also, by their deliberate carelessness and negligence for 9.5 years 1997-2006 to perform (act, take action) as requested by the parent in the best interest of the child, to get her the required help to do well in school. And, as reprisal for appellant parent Mr. Chisolm complaining to respondeat superiors and state and federal agencies/officials in the best interest of his daughter to get her the required help to do well in school, Appellant Mr. Chisolm and his daughter were deprived of their rights, privileges, or immunities as secured by the Constitution and laws; the appellees

acted with actual malice and/or actual intent while performing their ministerial and discretionary duties directed toward Mr. Chisolm and his daughter for 4 years 2002-2006 by placing a wall of reprisal and hindrance via deliberate actual malice harassment, negligence, defamation of character and cruelty to impede the efforts of Mr. Chisolm to advocate for his daughter to do well in school

Based on the insurmountable evidence and the appellees willful, malice, corrupt behavior, conduct, and actions; and deliberate carelessness and negligence in the performance of their discretionary and ministerial duties; the appellees does not meet the requirements for the rights and privileges of sovereign and official immunity. Therefore, the appellees are liable for personal injuries to Mr. Chisolm and his daughter because the 1991 constitutional amendment provides no official immunity defense for ministerial acts negligently performed or for discretionary acts performed with actual malice or a deliberate intent to injure. Thereby, based on the merits of the case and the preponderance of evidence the trial court erred in dismissing Mr. Chisolm's lawsuit. *Hennessy v. Webb,* 245 Ga. 329, 330-331 (264 SE2d 878) (1980); 42 USC 1983; Ga. Const. of 1983, as amended 1981, Art. I, Sec, 11, Par. IX; 14th Amendment of U.S. Constitution; *Baker v. McCollan*, 443 U.S. 137, 140 (99 SC2689, 61 LE2d 433). *Studen v. Beebe,* 588 F2d 560,

556 (6th Cir.); *Maine v. Thiboutot,* 448 U.S. 1, 4 (100 SC 2502, 65 LE2d 555) 4787.

Mr. Chisolm's remaining substantiated allegations are supported by the merits of the case and the preponderance of the evidence of blatant violations of laws and deliberate actual malice by appellee perpetrators cobb county school officials which injured Mr. Chisolm and his daughter are: discrimination, child cruelty and neglect, violations of OCGA 9-3-33, 20-2-720, and 20-2-751.4 and Mr. Chisolm's libel and defamation claim primarily against appellee respondeat superior Tom Dohrmann for his actual malice libelous utterance are all Civil Rights violations. Two (2) year limitations in actions for injuries to persons are applicable to civil rights actions and appellees employee Sullivan and respondeat superior Dohrmann. *Jones v. Bales*, 58 F.R.D. 453 (N.D. Ga. 1972), aff'd 480 F.2d 805 (5th Cir. 1973). ***42 USC 1983,*** a person who acts under the color of law to deprive another of the rights, privleges, or immunities secured by the Constitution and laws, shall be liable to the party injured.

14th Amendment to the Constitution, No State shall make or enforce law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Respondeat Superior, The doctrine under which liability is imposed upon any employer for the acts of its employees committed in the course and scope of employment.

Georgia Constitution Article I, Section II, Paragraph IX

. . . all officers and employees of the state or its departments and agencies may be subject to suit and may be liable for injuries and damages caused by negligent performance of, or negligent failure to perform, their ministerial functions and may be liable for injuries and damages if they act with actual malice or with actual intent to cause injury in the performance of their official functions . . . [q]ualified immunity "protects individual public agents from personal liability for discretionary actions taken within the scope of their official authority, and done without willfulness, malice, or corruption. [Cit.] Under Georgia law, a public officer or employee may be personally liable only for ministerial acts negligently performed or acts performed with malice or intent to injure.

It is reasonable to conclude that Mr. Chisolm's unemancipated daughter's personal school records are not applicable to the (public) Open Records Act.

Based on the facts contained in the record, the merits of the case, and the preponderance of evidence, the appellant respectfully request and pray that Georgia Court of Appeals reconsider its opinion

because the state court erred in dismissing appellants lawsuit for failure to state a claim.

Respectfully Submitted,

/s/ Marvin Chisolm
Marvin Chisolm, Pro Se

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARVIN CHISOLM, a single man, Plaintiff, v. BETTY GRAY LINDSEY TIPPENS, JOSEPH REDDEN, TOM DOHRMANN, GARY BOLING, BEVERLY SHOUN, *et al* Defendants.	)	NO: 1:06-CV-2767 BBM

PLAINTIFF'S MOTION TO COMPEL/MOTION TO STRIKE RESPONSE TO DEFENDANTS AND PROPOUNDING WRITTEN INTERROGATORIES

(Filed Jan. 17, 2007)

COME NOW, Plaintiff in the above-style matter, and based upon Federal Rules of Evidence (FRE) 901, 902, 903; Federal Rule of Civil Procedures (FRCP) 56(e), FRCP 12(f), FRCP 33, FRCP 36, FRCP 37(a), and FRCP 26(a) respectfully file motion to compel discovery. Defendants remain in their "cubby hole" and failed to cooperate and appropriately fulfill their duty to provide initial discovery and disclosure. Defendants must respond by affidavits or other tools of defense to Plaintiff's Motion of Summary Judgment

which is supported by a "good faith" affidavit of personal knowledge of the Defendants' actions, behavior, and character by actually communicating and interacting with them in their game of deceit and deception. Plaintiff respectfully request the Court to censure the Defendants for improperly pleading a defense with a motion to strike, impose sanctions for surreptitiously withholding discovery, and Defendants answer propounding interrogatories.

It appear, the Defendants are slowly sinking in an inescapable quagmire and utilized the Court's and plaintiff's tools to "fabricate an imaginary defense" – a fairy tale.

Thereby, the Defendants' need to manage their time wisely to ethically and honestly answer propounding interrogatories and, Defendants' pleading should be rendered irrelevant, useless, and mischievous with a respectfully granted Plaintiff Motion to Strike and Motion to Compel Discovery with sanctions.

RESPECTFULLY SUBMITTED this 17th day of January 2007.

Marvin Chisolm Pro Se

/s/ Marvin Chisolm
Marvin Chisolm

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARVIN CHISOLM, a single man,	)	
Plaintiff,	)	NO: 1:06-CV-2767 BBM
v.	)	
BETTY GRAY LINDSEY TIPPENS, JOSEPH REDDEN, TOM DOHRMANN, GARY BOLING, BEVERLY SHOUN, *et al*	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL/MOTION TO STRIKE RESPONSE TO DEFENDANTS AND PROPOUNDING WRITTEN INTERROGATORIES

I. INTRODUCTION

Defendants filed an invalid defense in the form of a motion to strike in a desperate attempt to vilify Plaintiff's good faith affidavit based on personal knowledge and Federal Rule of Civil Procedure (FRCP) 56(e). Plaintiff's submitted self-authenticating E-mails and letters are satisfied by the fact the writings are what they purport to be, has relevancy, and should be admissible as evidence in accordance with

Federal Rules of Evidence (FRE) 901(a), 902, and 903.

Specifically, Defendants concocted a "fairy tale defense" in a sneaky attempt to convince themselves of their misrepresentation of Plaintiff's affidavit of personal knowledge as legal conclusions. Defendants continue their exemplification of inappropriate behavior identified by theories of liabilities enumerated in Counts I through VIII of complaint. Therefore, Plaintiff respectfully requests the Court to strike Defendants' invalid defense.

II. STATEMENT OF FACTS

Furthermore, all Defendants cannot remain "silently in denial" on a required defense of a summary judgment supported by an affidavit. Defendants must respond by good faith affidavits and/or other defense tools as required by FRCP 56(e).

Moreover, all Defendants must "step up to the plate" and show cause for their inappropriate actions in accordance with "Accountability: Dragnet" "Like mice the quietly scurry to their cubby hole after quietly doing their subtle wrongdoing (sneaky and untrustworthy) and act like everything is picture perfect. Wolves in sheep's clothing." And, all Defendants must answer requests for propounding written interrogatories and admissions in accordance with (IAW) FRCP 33 and 36. Also, IAW FRCP 37(a) Plaintiff respectfully files this motion to compel Defendants to Discovery and disclosure as required by

FRCP 26(a) without awaiting a discovery request as did Plaintiff Marvin Chisolm; and "as reasonable and prudent persons would conduct themselves in similar situations and in accordance with Professional Standards of Ethics"; and to "appropriately uphold their duties and responsibilities in accordance with their, authority, position, **rules**, laws, and statutes". Defendants would not be subjected to the aforementioned rules if they had adhered to Professional Standards of Ethics, followed their Governance Process, and as outlined by Federal and State laws and statutes, and as stipulated by Plaintiff Marvin Chisolm to Defendants: "**ABIDE BY THE RULES!**"

III. CONCLUSION

For all the above and foregoing reasons, Defendants failed to conduct themselves as reasonable and prudent persons – behave themselves, are ethically challenged, and failed to "abide by the rules". However, there is an "escape clause" – a passover freely given by the Passover Lamb for any Defendants who were "*victimized by proven coercion*" *by superiors and/or others*; IDENTIFY THE PERPATRATORS.

HENCEFORTH, Plaintiff pray for Defendants' invalid defense be stricken from the record, Defendants be compelled to provide Discovery and disclosure with applicable sanctions, and Defendants answer request for interrogatories and admissions.

(*submission date and signature on concurrent page*)

RESPECTFULLY SUBMITTED this 17th day of January 2007.

Marvin Chisolm Pro Se

/s/ Marvin Chisolm
Marvin Chisolm

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

MARVIN CHISOLM, a single man, Plaintiff, v. LINDSEY TIPPENS, JOSEPH REDDEN, TOM DOHRMANN, GARY BOLING, BEVERLY SHOUN, et al Defendants.	)	NO. 06-A-10568-4

AFFIDAVIT OF MARVIN CHISOLM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

(Filed Jan. 8, 2007)

STATE OF GEORGIA

County of Cobb

Marvin Chisolm, being first duly sworn, upon his oath deposes and says:

1. I have been fulfilling my parental duties and responsibilities to the best of my abilities with faith and trusting in God.

2. The Defendants did not appropriately uphold their duties and responsibilities in accordance with their authority, position, rules, laws, and statutes.

3. The Defendants did not conduct themselves as reasonable and prudent persons would conduct themselves in similar situations and in accordance with Professional Standards of Ethics.

Dated this 8th day of January 2007.

/s/ Marvin Chisolm
Marvin Chisolm

SUBSCRIBED and SWORN to before me, the undersigned Notary Public, this 8th day of ~~December 2006~~ [January 2007].

/s/ Sharon M. Herndon
Notary Public

Notary Public, Cobb County, Georgia
My Commission Expires March 22, 2008.

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

MARVIN CHISOLM, a single man, Plaintiff, v. LINDSEY TIPPENS, JOSEPH REDDEN, TOM DOHRMANN, GARY BOLING, BEVERLY SHOUN, et al Defendants.	)	NO. 06-A-10568-4

PLAINTIFF'S REPLY TO DEFENDANTS RESPONSE AND STATEMENTS OF MATERIAL FACTS

(Filed Jan. 8, 2007)

Plaintiff on November 24, 2006, pursuant FRCP 12(f) respectfully moved the Court for an Order to Strike the Defendant's insufficient defense filed November 20th, 2006 as a "demurrer". Plaintiff afforded the Defendants an opportunity to conduct discovery by providing a description of documents (letters) sent to Defendants as stated in Memorandum of Law in Support of Plaintiff's Motion to Strike; (evidence) in accordance with FRCP Rule 26 (1)(B). Plaintiff pursuant to LR56.1B and Uniform State Rule 6.5 in accordance with Uniform Superior Court Rule 6.5 did provide a "statement of material

facts" in Memorandum of Motion for Summary Judgment. Evidence facts are resubmitted to comply with LR56.1B(1) and Uniform State Rule 6.5. Plaintiff respectfully request the Court to "caution" the Defendants to manage their time wisely, "follow the Golden Rule", and file responses and provide Plaintiff with "filed" copy in a timely and appropriate manner – Uniform State Court Rule 15.

Plaintiff (claimant) did exercise right to file summary judgment anytime after 20 days had elapsed, in accordance with FRCP Rule 56a. Pursuant to FRCP 12(f), LR56.IA, LR7.1C, Defendants have "exhausted all specific matters and objectives", and cannot act upon their own to file redundant or immaterial supplemental briefs and arguments. Furthermore, Defendant Thomas E. Dohrmann's Memorandum to State Court and filed in State Court of Cobb County November 3, 2006 is impeachable, reveals the theories and liabilities enumerated in Counts I thru VIII of Plaintiff's Complaint, and may be just cause to impeach gentleman Dohrmann; the Superintendent of Oconee County School District for gross Ethics violations and possible criminal indictment.

WHEREFORE, Plaintiff pray for justice to be served and judgment in favor of claimant.

RESPECTFULLY SUBMITTED this 8th day of January 2007.

Marvin Chisolm Pro Se

/s/ Marvin Chisolm
Marvin Chisolm

IN THE SUPREME COURT OF THE STATE OF GEORGIA

MARVIN CHISOLM, a single man	)	APPEAL CASE NUMBER
Appellant	)	A07A2356
v.	)	CASE NUMBER
LINDSEY TIPPENS, et al	)	S08C1099
Appellees	)	

MOTION FOR RECONSIDERATION

STATEMENT OF CASE AND JURISDICTION

This is a case of gravity and/or public importance certified to the Supreme Court. The Honorable Supreme Court of the State of Georgia has jurisdiction of this petition for certiorari pursuant to the Constitution for the State of Georgia, Article VI, Section VI, paragraph III, IV, and/or V.

PART I: STATEMENT OF THE CASE AND FACTS

On March 19, 2007, the record U.S. District Court erroneously overlooked material fact in the record and erroneously construed a provision of law thereby denied plaintiff's motion for summary judgment and entered an order dismissing appellant's federal law claims, remanding the state law claims back to the Cobb County State Court which the

Appellees removed to the federal court in November 2006.

The record State Court erroneously overlooked material fact in the record, a statute, and erroneously misapplied a provision of law. On May 21, 2007 the State Court of Cobb County denied plaintiff's motion for summary judgment and dismissed all of the appellant's state law claims without consideration of federal law claims in complaint originally filed in state court by plaintiff October 9, 2006.

On May 24, 2007 appellant filed a Notice of Appeal, the Court of Appeals also erroneously "overlooked a material fact in the record, a statute or a decision which is controlling as authority and which would require a different judgment from that rendered, or has erroneously construed or misapplied a provision of law or a controlling authority".

On February 5, 2003, the Court of Appeals opined and erroneously affirmed the record State Court judgment. Plaintiff filed motion for reconsideration on February 14, 2008. On February 26, 2008 the Court of Appeals denied Mr. Chisolm's motion for reconsideration. Plaintiff petitioned for certiorari with the Supreme Court on March 14, 2008.

The Supreme Court of Georgia denied the plaintiff's petition for certiorari on June 2, 2008.

PART II: ENUMERATION OF ERRORS

ENUMERATION ERROR 1

THE RECORD DISTRICT COURT ERRONEOUSLY CONSTRUED AND/OR MISAPPLIED A PROVISION OF LAW AND ERRED IN GRANTING APPELLEES' MOTION TO DISMISS AND DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT.

ENUMERATION ERROR 2

THE RECORD STATE COURT ERRONEOUSLY OVERLOOKED MATERIAL FACT AND STATUTE IN THE RECORD, MISAPPLIED AND/OR CONSTRUED A PROVISION OF LAW, AND ERRED IN GRANTING APPELLEES' MOTION TO DISMISS AND DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT.

ENUMERATION ERROR 3

THE COURT OF APPEALS ERRONEOUSLY OVERLOOKED A MATERIAL FACT, MISAPPLIED A PROVISION OF LAW AND CONTROLLING AUTHORITY, AND ERRED IN AFFIRMING THE RECORD STATE COURT JUDGMENT AND DENYING APPELLANT'S MOTION FOR CONSIDERATION.

PART III: ARGUMENT AND CITATION OF AUTHORITY

This case is controlled by various federal and state statutes. Plaintiff exhausted the 'elaborate administrative scheme' – "the system of things" in an effort of futility via county, state, and federal agencies. First, OCGA 20-2-720 and [20 USC 1232] provides:

"NO local school system, whether county, independent, or area, shall have [No funds shall be made available under any applicable program to any educational agency or institution which has] a policy denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children". Fact, Plaintiff was prevented from inspection and review of daughter's education records from October 1997 to November 2006, R3-6, R71-133, Supplemental Record 5-19.

Under 'color of the law', the respondeat defendants Carla Cohen, Beverly Shoun, Gary Boling, Tom Dohrmann, Joe Redden, Betty Gray, and Lindsey Tippens subjected and caused Plaintiff to be subjected for 10 consecutive school years to "the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States; shall any such law, statute, ordinance, regulation or custom, or usage of the State to the contrary notwithstanding, be liable to

the party injured in any action at lawsuit in equity or other proceeding for redress". 42 USC 1983.

Private cause of action is also available for plaintiff's daughter under 42 USC 1983 (n1350) for respondeat defendants Shoun, Boling, Dohrmann, Redden, Gray, Tippens failure as administrators and Board members 'to get the job done' – "to perform purely ministerial duties required by law" for 4.3 consecutive school years since 2003-2004 to present as requested by plaintiff. The defendants denied a child in need because of sociological factors with a known medical condition and disability the necessary help, support, and an appropriate evaluation to enable her to do well in school as repeatedly requested by the plaintiff. *Howard v. Friendswood Independent School Dist.,* (1978, SD Tex) 454 FD Supp 634, *Reply* Brief of Appellant, pages 6-8, Sep 12 2007.

Instead, the district court committed: ***ENUMERATION ERROR 1:*** **THE RECORD DISTRICT COURT ERRONEOUSLY CONSTRUED AND/OR MISAPPLIED A PROVISION OF LAW AND ERRED IN GRANTING APPELLEES' MOTION TO DISMISS AND DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT.**

Fed. R. Civ. P. 56(e)(f); District Court LR 56.1, LR7.1C; Brief of Appellant, pages 1-7.

The case is controlled by respondeat superior; Georgia Constitution Article I, Section II, Paragraph IX; 42 USC 1983; and 14th Amendment to the U.S.

Constitution. Fact, during school year 2003-2004 despite the wrongdoing of the defendants, plaintiff humbled himself in an effort of futility to facilitate an effective relationship with the middle school and school district in the best interest of his daughter. R18, R89-90, R636-638, motion for reconsideration, pages 8-10 with exhibit [plaintiff's email to respondeat superior and defendant's letter].

"Nothing in the history of the 1991 amendment intimates any intention by the voters or legislature to reinstate sovereign immunity is an absolute form so as to terminate completely the public's ability to bring an action for damages against a Georgia governmental entity". *City of Thomaston v. Bridges,* 264 Ga. 4, 7 (439 SE 2d 906) (1994) Supra at 5. The Supreme Court reasoned that the 1991 amendment was "manifest from the vote of the electorate and the express language of the General Assembly intended to address 'the inherent unfair and inequitable results' which occur in the strict application of the traditional doctrine of sovereign immunity". OCGA 50-21-21

In this case, "it was not an isolated instance that lasted two seconds", nor an unforeseen circumstance that occurred. The defendants Sullivan, Shoun, Boling, Dohrmann, Redden, Gray, and Tippens actions were intentional, extreme, reckless, egregious, and outrageous; and caused the plaintiff severe emotional distress to the point of admission to hospital for 4 days, incurred a medical ailment, and numerous consultation sessions with the clergy, and various support agencies in the school years of 2005

to present. *Bridges v. Winn-Dixie Atlanta,* 176 Ga. App. 227, 229-230(11) (335 SE 2d 445) (1995); Motion for Consideration Feb 14, 2008, pages 3, 9.

Liability is imposed on a government entity, that under the color of some official policy, 'causes' an employee to violate another's constitutional rights. Based on the facts,

"A's tort became B's liability if B caused A to subject another to a tort". It is reasonable to conclude that B is the respondeat superiors in this case and A is all other defendants [the teachers]. The primary reason – justification for the Sherman Amendment to the U.S. Constitution was that it was necessary and proper remedy for the failure of localities (states and counties) to protect citizens as the privileges and immunities clause of the 14th Amendment required. *Gonzaga University v. Doe,* 536 U.S. 273, 287 (2002).

The Washington State Court of Appeals and Supreme Court found Gonzaga and League to have acted under "the color of state law" for purpose of 42 USC 1983. Motion for Consideration, pages 12-13, Feb 14, 2008. When Gonzaga and League disclosed student's personal information to state officials in connection with state law teacher certification requirement, the Washington Court of Appeals reversed in relevant part, concluding FERPA does not create individual rights under 42 USC 1983. However, the Washington Supreme Court reversed that decision, and ordered FERPA damages reinstated. The Court acknowledged that "FERPA itself does not give rise to

a private cause of action", but reasoned that FERPA's disclosure provision gives rise to a federal right enforceable under 42 USC 1983. 20 USC 1232(a)(d).

Instead, the state court committed ***ENUMERATION ERROR 2:*** **THE RECORD STATE COURT ERRONEOUSLY OVERLOOKED MATERIAL FACT AND STATUTE IN THE RECORD, ERRONEOUSLY MISAPPLIED AND/OR CONSTRUED A PROVISION OF LAW, AND ERRED IN GRANTING APPELLEES' MOTION TO DISMISS AND DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT.**

R621-622, R203-229

The plaintiff's complaint is clear, accurate, concise, and contains indisputable material facts that [they] "led" to deliberate injury, damages, and losses to plaintiff and daughter. A compensation amount is stated and indicates that the plaintiff and daughter endured undue suffering, hardship, discrimination, and injury for almost 10 years; attributed to the negligent, deliberate, actual malice and reckless conduct of the appellees. Fact, the appellees conduct were arbitrary, capricious, corrupt, and odd with failure to 'purely perform their ministerial simple duties' [as a reasonable and prudent person would do and be in similar circumstances] which severely impacted plaintiff and his daughter to the point of emotional distress and impeded the progress of a disabled child to do well in school who according to the teachers' assessment; displayed an "inability to

focus", "easily distracted", "missing and/or incomplete assignments", "missing homework"; subpar test, quiz, exam, and **GPA** scores.

The complaint clearly states the jurisdiction and parties, general allegations, and provides a complete enumeration of the theories of liabilities based on material fact. R3-6 Appellee demonstrated in Motion for Consideration that the Court of Appeals "blindly" did not choose to see and repeated and reiterated the same errors as the district and state court. The Court of Appeals – "Let's realize that henceforth 'stare decisis' is like a train ticket – good for this date and this train only; tomorrow will be a new day and we will need a new ticket and will not be bound by what a full bench decided one hundred years ago". *Thomas v. State,* 136 Ga App. 165, 168 (220 SE 2d 736) (1975) (Judge Evans concurring specially). "It is well-established principle that a public official who fails to perform purely ministerial duties required by law is subject to an action for damages by one who is injured by his (her) omission". *Gilbert v. Richardson,* 264 Ga. 744 (45 SE 2d 476) (1994).

The appellees malice and corrupt conduct is not "an isolated instance that lasted 2 seconds". Plaintiff and his daughter were continuously injured for 10 years and 4.3 years respectively. Plaintiff established the fact of the respondeat superior's appellees state of mind by their inappropriate actions and failure to act in the best interest of appellant's "little one". attorney agent. R653-664. Instead, the Court of Appeals committed ***ENUMERATION ERROR 3:*** **THE COURT**

OF APPEALS ERRONEOUSLY OVERLOOKED A MATERIAL FACT, MISAPPLIED A PROVISION OF LAW AND CONTROLLING AUTHORITY, AND ERRED IN AFFIRMING THE RECORD STATE COURT JUDGMENT AND DENYING APPELANT'S MOTION FOR RECONSIDERATION.

Motion for Reconsideration Feb 14, 2008; *Troncalli v. Jones,* 237 Ga. App. 10, 16(4) (514 SE 2d 478).

PART III: CONCLUSION TO THE FACTS AND THE LAW

The record courts erred overlooking material fact and misapplied law and controlling authority. Appellant stated a claim, provided motion for summary judgment with undisputed material facts, and affidavit. Appellees failed to provide a defense. Appellant should have received summary judgment against the appellees. Therefore, this court should reverse the order of the record court, reverse the denial of the petition for certiorari, and grant summary judgment for the appellant.

Respectfully, /s/ Marvin Chisolm Marvin Chisolm Pro Se

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARVIN CHISOLM, a single man, Plaintiff, v. LINDSEY TIPPENS, JOSEPH REDDEN, TOM DOHRMANN, GARY BOLING, BEVERLY SHOUN, et al Defendants.	)	NO: 1:06-CV-2767 BBM

AFFIDAVIT OF MARVIN CHISOLM

(Filed Feb. 23, 2007)

Marvin Chisolm, being duly sworn, uon his oath deposes and says:

1. In accordance with Rule LR 7.1B and Order in the Court of Honorable Beverly B. Martin, Plaintiff affirm he could not respond to Defendant's Motion for Stay. Plaintiff did not receive service of Motion for Stay.

Dated this 23rd day of February, 2007. I certify a copy was mailed on this 23rd day of February, 2007.

via certified
Mail to Defendants

/s/ Marvin Chisolm
Marvin Chisolm

SUBSCRIBED and SWORN to before me the undersigned Notary Public this 23rd day of February. 2007

/s/ Mary E. Huckaby
Notary Public
Notary Public, Cobb County
My Commission Expires
[Illegible]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARVIN CHISOLM, a single man,	)	
Plaintiff,	)	NO: 1:06-CV-2767 BBM
v.	)	
LINDSEY TIPPENS, JOSEPH REDDEN, TOM DOHRMANN, GARY BOLING, BEVERLY SHOUN, et al	)	
Defendants.	)	

AFFIDAVIT OF MARVIN CHISOLM
IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

STATE OF GEORGIA

County of Cobb

Marvin Chisolm, being first duly sworn, upon his oath deposes and says:

1. I have been fulfilling my parental duties and responsibilities to the best of my abilities with faith and trusting in God.

2. The Defendants did not appropriately uphold their duties and responsibilities in accordance with their authority, position, rules, laws, and statutes.

3. The Defendants did not conduct themselves as reasonable and prudent persons would conduct themselves in similar situations and in accordance with Professional Standards of Ethics.

Dated this 22nd day of December 21, 2006.

/s/ Marvin Chisolm
Marvin Chisolm

SUBSCRIBED and SWORN to before me, the undersigned Notary Public, this 22nd day of December 2006.

/s/ Anita Morgan
Notary Public
ID # 071737822

(SEAL)
My Commission Expires
May 24, 2009

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARVIN CHISOLM, a single man, Plaintiff,	)	NO: 1:06-CV-2767 BBM
v.	)	
LINDSEY TIPPENS, JOSEPH REDDEN, TOM DOHRMANN, GARY BOLING, BEVERLY SHOUN, et al Defendants.	)	

NOTICE OF ALSO FILING MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF PLAINTIFF

(Filed Nov. 27, 2006)

TO: Clerk United States District Court

Notice of also filing Motion for summary Judgment and Memorandum in Support of Motion for Summary Judgment of Plaintiff with the State Court of Cobb County State of Georgia. Basis for the filing is, Defendants' Notice to Remove and Plaintiff's Notice to Remand; and contingent upon the decision of HONORABLE Judge Beverly B. Martin, U.S. District Court.

Respectfully submitted,

This ~~24~~ mc 27th day of November, 2006

I certify the document was mailed via U.S. first class mail on date indicated /s/ Marvin Chisolm.

Marvin Chisolm Pro Se

/s/ Marvin Chisolm
Marvin Chisolm

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

MARVIN CHISOLM, a single man, Plaintiff,	)	
v.	)	No. 06-A-10568-4
LINDSEY TIPPENS, JOSEPH REDDEN, TOM DOHRMANN, GARY BOLING, BEVERLY SHOUN, et al Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF PLAINTIFF

(Filed Nov. 27, 2006)

SUMMARY OF ARGUMENT

1. By Georgia Code, No local school system, whether county, independent, or area, shall have a policy denying or which effectively prevents, the parents of students who are in attendance at or who have been enrolled in any facility within such system the right to inspect and review the education records of their children. OCGA 20-2-720. To not abide by this code is an illegal act.

2. By Georgia Code, "Joint legal custody" means both parents have equal lights and responsibilities for major decisions concerning the child's education, health care, and religious training.

OCGA 19-9-6. To not abide by this code and/or establish policies to circumvent the code is illegal.

3. By Superior Court of Cobb County, "It is agreed by the Parties that Plaintiff and Defendant would have joint legal custody of minor child. Cv97-1-8938-05 To not abide by the Court order is contempt and illegal.

4. By Public Law/Rehabilitation Act, Parents have the right to obtain an independent Educational evaluation by a qualified examiner. Individuals with Disabilities Act (IDEA), Section 504 Rehabilitation Act of 1973, Public Law 105-17. To not abide by this law is illegal.

5. By CCSD Administrative Rules, All employees should exhibit a professional appearance in a manner and style; the Board of Education recognizes that the Code of Ethics sets appropriate standards for professional educators; the Board Chairperson shall primarily, assure the integrity of the Board's process; the Board commits itself to ethical . . . and lawful conduct. To not "abide by the Rules" is unethical and may be criminal acts.

I. FACTUAL BACKGROUND

Plaintiff's daughter and plaintiff was treated differently by denial of services afforded other students and parents-discrimination, neglect, reprisal; Defendants engaged in inappropriate conduct that in effect denied services-harassment, mental anguish, reprisal; discriminated in an adverse manner (reckless, malicious, wanton and callous disregard) to my daughter a developmentally disabled child and her

Dad a disabled veteran to leave student Paris A Chisolm behind in limbo and attempts to set up Dad Marvin Chisolm to take a fall – harassment, cruelty, defamation of character, reprisal, punitive damages.

II. DEFENDANTS ARE/WERE IN POSITIONS

Defendants are/were in positions at the CCSD to provide service, aid, benefits for the students and parents and are accountable for their actions.

III. CONCLUSION

Georgia Code 20-2-720, 19-9-6; Cobb County Superior Court Order dated November 8, 2000; IDEA and Section 504; and Cobb County School District Governance Process Policies provides valid and complete support of claims that are clearly and appropriately pleaded in: Plaintiff's Complaint, Motion to Remand, Motion to Strike, and Motion for Summary Judgment; and supporting evidence is sufficient to create a genuine issue of material fact and establishes a prima facie case.

WHEREFORE, Plaintiff respectfully request and pray the Court grant Summary Judgment in favor of Plaintiff.

RESPECTFULLY SUBMITTED this 27th day of November 2006.

Marvin Chisolm Pro Se

/s/ Marvin Chisolm
Marvin Chisolm

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

MARVIN CHISOLM, a single man, Plaintiff, v. KELLY J. SULLIVAN, BEVERLY SHOUN, Principal COHEN, GARY BOLING, KATHRYN JONES, HEATHER MOODY, TARA GAUNTT, TOM DOHRMANN, JOE REDDEN, LINDSEY TIPPEN, CURT JOHNSON, BETTY GRAY; COBB COUNTY SCHOOL DISTRICT (CCSD) Defendants.	NO. 06-A-10568-4 COMPLAINT (Filed Oct. 9, 2006)

Plaintiff alleges:

JURISDICTION AND PARTIES

1. Plaintiff Marvin Chisolm is a resident of Cobb County, Georgia.

2. Defendants are employees or former employees of the CCSD.

3. Defendant CCSD is a local education area with public schools organized and existing under the

laws of the state of Georgia, and doing business in the state of Georgia out of which plaintiff's claim arose.

4. This Court has jurisdiction of this matter under the provisions of Georgia statutory code 20-2-720, No Child Left Behind "parental involvement" A and appendix B, and section 504 IDEA protecting students with disabilities. The amount in controversy is $13,000,000.

GENERAL ALLEGATIONS

5. October 3, 1997 through 2005 school years at Norton Park Elementary and Floyd Middle School denied parent Marvin Chisolm access to review school records, receive report cards, receive progress reports of daughter Paris A. Chisolm and denial of participation in parental involvement activities at school. Parent Marvin Chisolm has "joint legal custody" as stated in Court order of the Cobb County Superior Court.

6. October 15, 2003 defendant Floyd Middle School principal Boling, guidance counselor Shoun, teachers Sullivan, Jones, Gauntt, Moody refused plaintiff request for a full evaluation to rule out a learning disability "in the best interest of the child" Paris A. Chisolm who was identified as developmentally delayed, in the exceptional family member program, and have blurry vision and corneal scarring result of a medical condition.

Refused to have conference to foster effective communication between school and parents, and refused/ignored my request to be involved in PTSA activities to build Paris' self esteem to know her parents are involved and care about her education, The aforementioned did everything in their ability to setup my daughter for failure and to be left behind in limbo. Area superintendent Dohrmann and Board members Redden, Tippen, Johnson, and Gray failed to provide help for my daughter and exercise proper judgment and leadership to address my complaint and eradicate the foolishness. As a result of plaintiff's use of grievance procedures (complaint) to upper echelon leadership, State Department of Education, and the US Department of Education civil rights office, and elected officials harassment and reprisal occurred from Floyd Middle School guidance counselor Shoun and teachers after principal Boling was transferred to North Cobb High School for 2004-2005 school year in a very very close proximity to teacher Kelly Sullivan's living area.

7. 2004-2005 school year plaintiff withdrew complaint to continue investigation and see how the school would conduct itself. Floyd Middle School failed test. Received reprisal, school failed to place daughter in a reading and writing class as requested by parents prior to school year

in preparation for High School and the addition of the writing test on the SAT and Georgia graduation test, Paris' 5th grade records indicate she is below standard for reading, writing and math. Again action indicate a set up for failure.

8. Saturday April 30, 2005 2am teacher Kelly Sullivan et al followed me to Kinkos copies and was standing outside Kinkos entrance as I exited. Mrs. Sullivan was exhibiting herself and a gentleman in an attempt to harass and intimidate me. I informed Principal Lawrence Bynum of the matter via email later on same date. In an attempt to cover-up her wrongdoing/participation in wrongdoing teacher Sullivan utilized deception, false accusations, in a letter to me and utterance which constitute defamation of my character and libel/slander. The aforementioned activity is actions that professional, law-abiding, reasonable and prudent educators would not do. Investigation reveal at some point in time teacher Sullivan relocated in the same area from very very close to very close proximity to North Cobb High School.

9. For 8 years plaintiff and his daughter suffered mental anguish, neglect, harassment, cruelty, reprisal, discrimination, and defamation of character.

CAUSES OF ACTION

10. Plaintiff is entitled to recover damages from defendants and each of them based on theories of liability hereinafter enumerated in I through VII, and under such other theories of liability as may be appropriate based upon the facts as alleged herin or as revealed during discovery.

COUNT I-MENTAL ANGUISH

(Against all defendants)

11. In committing the acts alleged herein, defendants intended to cause plaintiff and daughter imminent and intentional pain and suffering.

COUNT II-NEGLECT

(Against defendants Redden, Dohrmann, Boling, Shoun, Sullivan, Moody, Gauntt, Jones)

12. Defendants had a duty to plaintiff to act with reasonable care to help student Paris A. Chisolm as requested by parent Marvin Chisolm.

COUNT III-HARASSMENT

(Against defendants Boling, Shoun, Sullivan)

13. In committing the acts alleged herein, defendants' words or conduct intended

to pester, upset, disturb, or cause emotional distress.

COUNT IV-CRUELTY

(Against defendants Tippen, Johnson, Gray, Boling, Shoun)

14. In committing the acts alleged herein, defendants words or conduct intended to inflict damage to prevent certain children to thrive and be left behind without compassion, heartless.

COUNT V-REPRISAL

(Against defendants Dohrmann, Boling, Shoun, Jones, Sullivan)

15. In committing the acts alleged herein, defendants conduct intended to set-up barriers to ensure daughter's failure, be left behind, and inability to thrive and to set-up plaintiff to take a fall.

COUNT VI-DISCRIMINATION

(Against all defendants)

16. In committing the acts alleged herein, defendants conduct is in violation of federal and state statutes which require no distinction be made between people in educational activities.

COUNT VII-DEFAMATION OF CHARACTER

(Against defendants Dohrmann, Boling, Shoun, Sullivan et al Norton Park Elementary and Floyd Middle School)

17. In committing the acts alleged herein, utterance, writings, hearsay, prejudice, and preconceived notion falsely and intentionally to injure the good name or reputation of another person.

COUNT VIII-PUNITIVE DAMAGES

(Against all defendants)

18. The conduct, acts, and omissions of defendants alleged herin were in part intentional and in part evinced a reckless and callous disregard for plaintiff's daughter and plaintiff's safety and well-being, were consciously malicious, and displayed a conscious disregard for the unjustifiable substantial risk of significant harm to plaintiff's daughter Miss Paris A. Chisolm and plaintiff Marvin Chisolm.

19. Plaintiff prays to receive punitive damages.

WHEREFORE, plaintiff respectfully request and pray that the Court enter judgment in favor of plaintiff and against defendants and each of them as follows:

1. For general and special damages in the amount of $12,000,000.
2. For punitive damages in the amount of $2,000,000.
3. For plaintiff's reasonable costs incurred herein.
4. For such other and further relief as to the Court seems just in the premises.

Dated this 9th day of October, 2006

/s/ Marvin Chisolm
Marvin Chisolm
Plaintiff

Supreme Court, U.S.
FILED
OCT 8 - 2008
OFFICE OF THE CLERK

No. 08-324

IN THE SUPREME COURT OF THE UNITED STATES

MARVIN CHISOLM,

Petitioner,

v.

KELLY J. SULLIVAN, BEVERLY SHOUN, Principal COHEN, GARY BOLING, KATHRYN JONES, HEATHER MOODY, TARA GAUNTT, TOM DOHRMANN, JOE REDDEN, LINDSEY TIPPINS, CURT JOHNSTON, BETTY GRAY, and COBB COUNTY SCHOOL DISTRICT (CCSD),

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT TO THE QUESTIONS PRESENTED

1. Whether the Petitioner has timely filed the writ of certiorari with the Supreme Court of the United States.

2. Whether the Petitioner's Writ of Certiorari complied with the Rules of the Supreme Court.

3. Whether the Georgia Court of Appeals committed any error in affirming the dismissal of the Petitioner's lawsuit which was filed in the State Court of Cobb County, Georgia

PARTIES TO THE PROCEEDING

The Petition for a Writ of Certiorari ("Pet.") correctly identifies the parties to the proceeding below however the Petitioner has incorrectly spelled the names of some of the individuals, namely Lindsey Tippins and Curt Johnston.

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I. BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW AND JURISDICTION

The Opinion of the Court of Appeals of Georgia affirming the order from the state court of Cobb County, Georgia granting the Respondent's motion to dismiss the state-law claims of the Respondents, which was published as 289 Ga. App. 757 and is reprinted in the Appendix to the Petition at Appendix 1. A timely motion for reconsideration was denied by that Court on February 26, 2008. (Appendix 1.) Respondents contend that the Petition for Writ of Certiorari was not timely filed.

STATUTE AND REGULATION INVOLVED

This petition apparently involves the decision of the Appeals Court of Georgia to affirm the dismissal of the Petitioner's state law tort claims as follows: mental anguish, neglect, harassment, cruelty, reprisal, discrimination, and defamation. Petitioner also sought $12,000,000 in general and special damages, and $ 2,000,000 in punitive damages. Previously, the U.S. District Court dismissed the Petitioner's federal law claims for discrimination under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 violations of the Individuals with Disabilities Act, 20 U.S.C. § 1400 *et seq.*, and violations of No Child Left Behind, 20 U.S.C. § 6301 *et seq.* The U.S. District Court granted the dismissal of those federal claims on March 19, 2007. (Appendix 2.) Hence, res judicata barred the re-litigation of the federal law claims in

state court. *Bradley v. Ga. Institute of Tech.*, 228 Ga. App. 216, 217, 491 S.E. 2d 453 (1997).

STATEMENT

1. **State Court Proceedings.** The Petitioner filed his complaint on October 9, 2006, in the State Court of Cobb County. All of the Petitioner's summonses were defective. The Respondents removed this case from the State Court of Cobb County to U.S. District Court, Northern District of Georgia, on November 13, 2006, based on the Petitioner's apparent federal law claims. Pre-Answer Motions to Dismiss were filed on behalf of all Respondents except for Respondent Jones and Cohen.[1] The Petitioner's complaint contained, or appeared to contain, alleged violations of federal law, such as: a claim pursuant to 42 U.S.C.§ 1983 claim, a violation of the Individuals with Disabilities Education Act ("IDEA"), and a violation of the Family Educational Rights and Privacy Act ("FERPA").

2. **Federal Court Proceedings.** After the case was removed to federal court in November, 2006, the Petitioner filed a motion for summary judgment in both federal and state court, filed a motion to compel[2], served discovery requests, and

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[1] The Cobb County School District has searched its records and could find no records for any "Principal Cohen." Respondent Jones was never been personally served with this lawsuit. Counsel for the Respondents had no knowledge that Respondent Cohen had ever been personally served with this lawsuit.

[2] Petitioner filed his motion to compel on the same day that he served the discovery requests.

filed a motion to strike. These motions were made despite the fact that the Respondents filed a Pre-Answer Motion to Dismiss in federal court pursuant to Fed.R.Civ.P. 12(a)(4)(A).

On March 19, 2007, the U.S. District Court entered an order dismissing the Petitioner's federal law claims, remanding the state law claims back to the Cobb County State Court. (Appendix 2.)

3. **State Court Proceedings.** Back in state court, the Cobb County School District and the Individual Respondents, except for Kathryn Jones and Principal Cohen, filed their Answers and a Motion to Dismiss on March 23, 2007, arguing that all of Plaintiff's claims against them were subject to immediate dismissal for various reasons. The Respondents filed a Motion to Stay discovery pending the Court's ruling on the Motion to Dismiss. Then Respondents' Jones and Cohen filed their Motions to Dismiss and Answers on April 13, 2007.

Since the remand of the case to state court, the Petitioner filed two motions to strike in federal court and two motions to strike in state court. To the extent that the Petitioner responded to the Respondents' motion to dismiss, he filed a Response Brief on May 1, 2007, which was filed more than thirty-three (33) days after service. Sup. Ct. R. 6.2.

In either state or federal court, the Petitioner never identified any facts in his responsive briefs that even suggested that his claims were timely filed or that he had set forth any viable causes of action. Instead, the Petitioner talked about removing certain school officials from their positions, sought an apology from the School District and accused the Respondents of "being naughty (misbehavior)." He

even made references to "Humpty Dumpty," and a "mad diabolical 'master' plan" of "superior" funding.

On May 21, the State Court of Cobb County dismissed all of the Petitioner's state law claims. The Petitioner filed a Notice of Appeal on May 24, 2007, but failed to set forth the jurisdictional authority of the Georgia Court of Appeals. Notably, the Petitioner never identified what legal error was committed by the State Court in dismissing his complaint.

4. Court of Appeals Proceedings. On February 5, 2008, the Appeals Court of Georgia affirmed the dismissal of Petitioner's complaint by the State Court. The Petitioner filed a motion for reconsideration of the Appeal's Court opinion on February 14, 2008. On February 26, 2008, the Appeals Court denied the motion for reconsideration.

5. Georgia Supreme Court Proceedings. On March 3, 2008, Petitioner filed a notice of intent to file a Petition for Certiorari. On March 14, 2008, Petitioner filed his Petition for Certiorari to the Georgia Supreme Court. On June 2, 2008, the Georgia Supreme Court denied Petitioner's petition. The motion for reconsideration was denied on June 30, 2008. (Appendix 3.)

REASONS FOR DENYING THE REVIEW

1. Petitioner's Writ is Untimely. Among the grounds that the United States Supreme Court can deny a writ of a petition for certiorari is because it is not timely. *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 70 S.Ct. 252 (1950); *Bowles v.*

Russell, 127 S. Ct. 2360, 2366, 168 L. Ed. 2d 96 (2007). Petitioner is seeking a review of the Court of Appeals decision, which was issued on February 5, 2008. The denial of the motion for reconsideration was issued on February 26, 2008. Sup. Ct. R. 13 provides that "a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment." Sup. Ct. R. 13.1. Here, the Petitioner had to file his petition for writ of certiorari with the U.S. Supreme Court on or before May 27, 2008. However, he did not file his petition until September 5, 2008. Under federal law, an untimely filed writ of certiorari is a basis to deny the Supreme Court's jurisdiction over the matter. 28 U.S.C. § 2101(c). Hence, Respondent's petition must be denied.

Further, Petitioner is seeking a review of a decision of the Georgia Court of Appeals, which is not the court of last resort in the State of Georgia. Ga. Const. Art. VI, Sec. VI, Para. III, V, VI. Hence, Petitioner's petition should be denied.

2. **Petitioner Failed to Comply with Supreme Court Rules.** The Petitioner has not properly set forth any question for the U.S. Supreme Court to review. Sup. Ct. R. 10. Namely, Petitioner does not seek a review of any decision made by a United States Court of Appeals. In fact, no such court rendered any decision in this case. Sup. Ct. R. 10(a).

Petitioner also does not seek review any decision rendered by the court of last resort in Georgia, which is the Georgia Supreme Court. Sup.

Ct. R. 10(b). The Petitioner merely requests the review of a decision by the Georgia Court of Appeals, which is untimely for the reasons set forth above.

Finally, and in reviewing Petitioner's petition, it is not clear what the legal question is that he is trying to present to the U.S. Supreme Court. For instance, he stated that decision of the Georgia Court of Appeals erred by applying the doctrine of respondeat superior. However, the Georgia Court of Appeals decision never addressed that legal concept in its decision. Further, the Plaintiff asserts that the Georgia Court of Appeals decision conflicted with an opinion from Ninth Circuit Court of Appeals. *Cohen v. Cahill*, 281 F.2d 879 (9th Cir. 1960). However, that opinion was applying the federal rules of civil procedure, which was not an issue addressed by the Georgia Court of Appeals. The remaining cases cited by the Petitioner are inapposite. In sum, Petitioner's questions presented do not comply Sup. Ct. R. 14(a) and his petition should be denied.

3. **Petitioner's Complaint Failed to State a Claim**. The granting of a writ of certiorari is not a matter of right, but one of discretion exercised by the U.S. Supreme Court. *Heckler v. Edwards*, 465 U.S. 870, 885, 104 S. Ct. 1532 (1984). Because Petitioner's complaint lacks any merit, the Supreme Court should deny his petition.

Assuming the facts stated in Petitioner's Complaint are true, Petitioner is the parent of a student (hereinafter referred to as "P.A.C.") who was a student at Norton Park Elementary School and Floyd Middle School in the Cobb County School District. The Petitioner provided no dates of his daughter's attendance at either school. The

Petitioner did not set forth any facts that a tort was committed within the statute of limitations for the claim. Further, the Petitioner has brought the complaint only on his behalf. There are no causes of action being brought on behalf of his daughter.

Generally, the Petitioner claims that he was discriminated against in the following manner: he was harassed and retaliated against in response to his requests to review his child's educational records, he was denied his request to have his child tested for special education services, his request for parent conferences and his request to be involved in the PTSA. Specifically, he claimed that on October 15, 2003, the School District refused his request for an evaluation of P.A.C. Petitioner further claimed that the School District failed to place his daughter in a class that he requested and that he was retaliated against. Finally, he claims that a teacher harassed him on April 30, 2005, when the teacher was with a gentleman around 2 a.m. outside of a Kinko's. According to the complaint, the teacher subsequently defamed the Petitioner. No specific defamatory statement was ever identified or referenced to in his complaint, nor was there any mention about the date of the alleged defamatory statement.

Petitioner has failed to state any claim against the Respondent Cobb County School District. In this case, the doctrine of sovereign immunity operates as a complete bar to Petitioner's claims against the Cobb County School District. Even accepting all of Petitioner's allegations as true, the allegations asserted in their complaint fail to state a claim for relief against the Cobb County School District under clearly established Georgia law. The following claims in Petitioner's complaint are ostensibly based on Georgia law: Count I – mental

anguish (Petitioner's complaint ¶11.); Count II – Neglect (Petitioner's complaint ¶12.); Count IV – Cruelty; and Count VII – Defamation of Character

To explain, the Cobb County School District is a political sub-division of the State of Georgia, and is vested with sovereign immunity unless such immunity is waived in accordance with Art. I, Sec. II, Par. IX (e), Ga. Const. of 1983. *Crisp County Sch. Sys. v. Brown*, 226 Ga. App. 800, 487 S.E.2d 512 (1997). The Georgia Tort Claims Act provides for a limited waiver of the state's sovereign immunity for the torts of its officials and employees, but the Act expressly excludes counties and school districts from the waiver. O.C.G.A. § 50-21-22(5). *Wellborn v. Dekalb County Sch. Dist.*, 227 Ga. App. 377; 489 S.E.2d 345 (1997). Therefore, the Georgia Tort Claims Act does not divest the Respondent School District of sovereign immunity. Sovereign immunity can only be waived by a legislative act that specifically states that sovereign immunity is waived. Consequently, the Cobb County School System is excluded from the provisions of the Georgia Tort Claims Act. Simply put, the Respondent Cobb County School District is not subject to suit absent a waiver of its immunity. There is no such waiver in this case, and as a result, none of the state law claims presented in Petitioner's Complaint entitle him to a recovery against the School District.

A motion to dismiss is aimed at the merits of a claim. *Williamson v. Perret's Farms, Inc.*, 128 Ga. App. 687, 687, 197 S.E.2d 754 (1973). Petitioner's claims against the respondent School District in this case have no merit under existing Georgia law. Accordingly, Petitioner's Complaint must be dismissed for failure to state a claim upon which

relief may be granted.

Official Immunity Bars Petitioner's State Law Tort Claims Against Individual Respondents

Similarly, Petitioner's causes of action are barred by the doctrine of official immunity. Just as Georgia school districts and boards are entitled to sovereign immunity, their employees -- here the individual Respondents -- are entitled to official immunity from personal liability for injuries sustained because of the negligent performance of discretionary official acts. *Crisp County School District v. Pheil*, 231 Ga. App. 139, 140, 498 S.E.2d 134 (1998).

As stated earlier, Petitioner alleged that the Respondents initiated and/or condoned a pattern of neglect and harassment against Petitioner and his daughter. Petitioner's state law tort claims include the following: "mental anguish", "neglect", "harassment", "cruelty", "reprisal", and "defamation". The Petitioner's complaint contains no allegation that any harassing or cruel actions, that any defamatory words or that any action was undertaken with any actual malice. In the alternative, there is no allegation that any of the duties were ministerial.

The Georgia Court of Appeals has described the applicability of official immunity as follows:

> Official immunity ... is applicable to government officials and employees sued in their individual capacities. While official immunity does not apply to purely ministerial duties required by

> law, public officials are immune from individual liability for discretionary acts undertaken in the course of their duties and without willfulness, malice, or corruption. This official immunity is intended to protect public officials in the honest exercise of their judgment, however erroneous or misguided that judgment may be. Otherwise, not only would it be difficult to get reasonable men to fill public office, but there would be constant temptation to yield officially to unlawful demands, lest private liability be asserted and enforced.

Schmidt v. Adams, 211 Ga. App. 156; 438 S.E.2d 659 (1993).

The question of whether official immunity applies to a particular claim turns on the determination of whether the underlying act is "ministerial", which is one required specifically by law, or "discretionary", which is one that requires the exercise of judgment or choice on the part of the official. The Court of Appeals has described this application of immunity as follows:

> It is a well established principle that a public official who fails to perform purely ministerial duties required by law is subject to an action for damages by one who is injured by his omission. However, it is equally well established that "where an officer is invested with

> discretion and is empowered to exercise his judgment in matters brought before him, he is sometimes called a quasi-judicial officer, and when so acting he is usually given immunity from liability to persons who may be injured as a result of an erroneous decision; provided the acts complained of are done within the scope of the officer's authority and "*without willfulness, malice or corruption.*" These discretionary acts ... lie midway between judicial and ministerial ones. The name of the public officer or officers is immaterial and the question depends on the character of the act. If the act done for which recovery is sought is judicial or quasi-judicial in its nature, the officer acting is exempt from liability.

Swofford v. Cooper, 184 Ga. App. 50, 52, 360 S.E.2d 624 (1987).[3]

In Georgia, when determining whether official immunity applies to a particular action, the Court of Appeals has indicated that "[t]he single overriding factor is whether the specific act from which liability

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[3] In making the same determination, the Court of Appeals in *Bitterman v. Atkins*, 217 Ga. App. 652, 654 (1995), also added "where public officials are acting within the scope of their duties and exercising a discretionary power, *the courts are not warranted in interfering*, unless fraud or corruption is shown or the power or discretion is being manifestly abused to the oppression of the citizen." *Id*, citing *Sisson v. Douglas County School District*, 181 Ga. App. 77, 3515 S.E. 2d 272, (1986) (emphasis added).

allegedly arises is discretionary or ministerial." *Id.*, citing *Shuman v. Dyess*, 175 Ga. App. 213, 216, 333 S.E.2d 379 (1985). This determination is made on a case-by-case basis. *Id.* Actions are to be analyzed for the purpose of the application of official immunity by analyzing the underlying act of the official. The Court of Appeals has described this process as follows:

> In Georgia the distinction between a ministerial and a discretionary act, and therefore the scope of the immunity granted a public official in any given situation turns upon the specific character of the complained-of act, not the more general nature of the job. Under this standard, it makes no difference that the official is required to perform discretionary acts if the complained-of act is more properly characterized as ministerial. The grant of [official] immunity, then, is really more in the nature of a transitory privilege rooted in the fear that a contrary rule would inhibit the judgment upon which good government rests.

Id. (citations omitted).

Courts have consistently defined ministerial and discretionary acts as follows:

> A ministerial act is commonly one that is simple, absolute, and definite, arising

> under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. A discretionary act, however, calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed.

Kelly v. Lewis, 221 Ga. App. 506, 508, 471 S.E.2d 583 (1996), citing *Joyce v. Van Arsdale*, 196 Ga. App. 95, 96 (1990); see also *Murphy v. Bajjani*, 282 Ga. 197, 647 S.E. 2d 54 (2007) (even statutorily-mandated actions are not ministerial duties if the mandated action is not "simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty').

In *Gamble v. Ware*, 253 Ga. App. 819, 561 S.E.2d 837 (2002), the Court of Appeals affirmed the trial court's grant of motions to dismiss filed on behalf of various school administrators. The underlying facts of *Gamble v. Ware*, which are similar to the facts in the instant litigation, illustrate that Mr. Gamble, on behalf of his son K.G., filed an action against the superintendent of the Ware County School District, the assistant principal of the school where K.G. was a student, and the director of transportation for the school district regarding a school bus incident involving K.G. Apparently, K.G. was suspended from his school bus after he allegedly committed an act of sexual misconduct. Mr. Gamble filed suit against the above-referenced defendants alleging that they committed acts of negligence, intentional inflicted emotional distress, committed acts of libel, and other

unspecified malicious acts when they fabricated the sexual misconduct charges against K.G. and suspended him from the bus. *Id.* at 823-24.

The Georgia Court of Appeals affirmed the trial court's dismissal of these claims on the basis of official immunity. In doing so, the Court of Appeals reasoned that

> Gamble's complaints also present no justiciable tort issue regarding Superintendent Brantley, Assistant Principal Williams, and Transportation Director Beverly. The doctrine of official immunity 'protects individual public agents from personal liability for discretionary actions taken within the scope of their official authority, and done without willfulness, malice or corruption'.

Gamble, 239 Ga. App. at 824.

The state law tort claims dismissed in *Gamble v. Ware* are almost identical to the claims presented in the instant action. Just as in *Gamble*, these claims are also subject to immediate dismissal. Further, as in *Murphy v. Bajjani*, the Petitioner has not sufficiently alleged any actual malice to defeat the assertion of the defense of official immunity. *Bajjani*, 282 Ga. at 203. The appeals court's order should be affirmed.

Petitioner's Claim for Punitive Damages Fails

Further, Petitioner's claim for punitive

damages fails against the Respondents because of the application of sovereign immunity. In addition, the Petitioner alleged no facts to sustain a claim for punitive damages. Further, as a matter of public policy, punitive damages are not permitted against a public entity, such as a school district or school employees. *MARTA v. Boswell,* 261 Ga. 427, 427-428, 405 S.E. 2d 869 (1991). For the foregoing reasons, the dismissal of the Petitioner's claim for punitive damages should be affirmed.

Statute of Limitations Defense for State Law Claims

Petitioner cannot recover on his state law tort claims as they are barred by the two-year statute of limitation for such claims. The Petitioner has set forth no facts in which a tort was committed against him within two years of filing his suit, i.e., October 9, 2004. In general, personal injury claims must be brought within two (2) years after the right of action accrues, except for injuries to reputation, which must be brought within one (1) year. O.C.G.A. § 9-3-33. If such claims are not brought before the statute of limitations expires, they are subject to immediate dismissal. *Bynum v. Fulton-DeKalb Hosp. Auth.,* 267 Ga. App. 899, 600 S.E.2d 623 (2004).

Petitioner's tort claims are time barred as all of the alleged actions occurred well before October, 2004. For instance, the Petitioner claims that on October 15, 2003, some Respondents denied his daughter an evaluation in order to qualify for special education services. (Petitioner's Complaint, ¶ 6). Similar allegations are contained in Paragraph 5 of his complaint.

For the foregoing reasons, the Petitioner's state law tort claims are time barred. The appeals court's order should be affirmed.

Petitioner's Failure to Properly Serve the Respondents

Petitioner's Complaint must be dismissed because of the lack of personal jurisdiction over the Respondents as a result of the defective summons. Under Georgia law, the summons shall state the name and address of the Petitioner where the Respondent can respond. O.C.G.A. § 9-11-4(b). Here, the Petitioner did not provide his address but improperly provided address of the State Court of Cobb County. The Respondents raised the defense of "insufficient service of process and failure of service of process" in their Answers.

As this requirement is mandatory, rather than permissive, then the Petitioner has failed to satisfy this fundamental service requirement. "In the absence of service in conformity with O.C.G.A. § 9-11-4, the court does not obtain jurisdiction over the defendant." *Wilkinson v. Udinsky*, 242 Ga. App. 454 (1) (530 S.E.2d 215) (2000). Further, it is of no consequence that the Petitioner is proceeding pro se in this case. In a civil case, the court cannot put a pro se litigant on a different standard from one represented by counsel." *Merck v. St. Joseph's Hosp. of Atlanta,* 251 Ga. App. 631, 555 S.E.2d 11 (2001). Hence, dismissal of the Petitioner's complaint should be affirmed.

Petitioner Failed to Properly Plead His Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress Claim

Petitioner failed to state a claim for Intentional Infliction of Emotional Distress or Negligent Infliction of Emotional Distress. These claims in Petitioner's complaint failed to present a justiciable issue of law or fact. To explain, to the extent that the claim pled in Paragraph Eleven in Petitioner's Complaint states a cognizable state tort law cause of action, this claim for "mental anguish" would most likely be construed to be a claim for intentional infliction of emotional distress and/or negligent infliction of emotional distress under Georgia law. However, even if the Court construed this claim as such, it would still be subject to dismissal for failure to plead any facts in support of any claim for relief.

In order to properly plead an intentional infliction of emotional distress claim, an Petitioner in Georgia must show that a defendant's actions were terrifying or insulting as to humiliate, embarrass or frighten the Petitioner. *Georgia Power v. Johnson*, 155 Ga. App. 862, 863, 274 S.E.2d 17 (1980). The behavior attributed to the Respondents in this case cannot reasonably be characterized as humiliating, insulting, or terrifying, being confined, as it relates to matters concerning access to records, permission to join the PTSA, etc . . . . Further, there are no allegations that any egregious behavior was directed at the Petitioner. *MARTA v. Mosley*, 280 Ga. App. 486, 634 S.E.2d 466 (2006).

The pleading requirement for a negligent

infliction of emotional distress claim is even more stringent. Specifically, a party must show that there was some impact on the Petitioner, and that impact must be a physical injury. *Hall v. Carney*, 236 Ga. App. 172, 174, 511 S.E.2d 271 (1999).

Petitioner's state tort law claims against the Respondents as plead in his Complaint clearly fail to meet the above-referenced standards necessary to properly plead claims for intentional infliction of emotional distress and negligent infliction of emotional distress. As such, these claims are subject to dismissal. The appeals court's order should be affirmed.

Any Claim Premised on O.C.G.A. 20-2-720 Must Be Dismissed

O.C.G.A. § 20-2-720 contains no provision creating a private cause of action for a party claiming a violation of it. Any claim based on this statute in Petitioner's complaint failed to present a justiciable issue of law or fact. There is no case law interpreting this statute. Thus, the foregoing statute cannot provide a basis for civil liability against the Respondents and any claim based on that statute must be dismissed. The order of the trial court should be affirmed.

Petitioner's Claims in Count II, III, IV, V and VII are Barred for Failure to State a Cognizable Claim

All of Petitioner's claims are barred for failure to state a cognizable claim under Georgia law.

Specifically, Counts II, III, IV, V and VII failed to present a justiciable issue of law or fact. As difficult as it is to comprehend Petitioner's complaint, it is even more difficult to understand how any of these allegations amount to potential violation of Georgia tort law. The Petitioner has the following vague causes of actions: Count II – Neglect; Count III – Harassment; Count IV – Cruelty; Count V – Reprisal; and Count VII – Defamation of Character.

In Counts II through V, the Petitioner has not pled any cognizable claim under Georgia law. There is simply no cause of action in this jurisdiction for such claims. Further, even if there was a cause of action, he has set forth no facts in his complaint that would lead to any claim for relief. While a complaint is not required to set forth a cause of action, it is required to set forth a claim for relief. *Nicolson v. Windham*, 257 Ga. App. 429, 571 S.E. 2d 466 (2002). Specifically, there are no facts alleged in his complaint that would show that any Respondent neglected him, harassed him, was cruel to him or retaliated against him. As such, these claims must be dismissed.

Turning to the defamation claim, the Petitioner claims that Respondent Kelly Sullivan "exhibited herself" to intimidate the Petitioner on April 30, 2005. However, this claim is insufficient to set forth a tort claim because there was no touch or defamatory statement by this Respondent to constitute defamation or any other tort. In addition, the Petitioner has not alleged any defamatory statements. Further, the alleged conduct cannot be used to support a claim of defamation because it occurred more than a year from the filing of the suit. Finally, the School District cannot be liable for any such conduct because the allegation clearly occurred

after hours and off campus. Hence, Respondents' Motion to Dismiss should be affirmed.

Petitioner has Abandoned All of his Claims Against the Respondents

The Respondents filed their Motion to Dismiss all of Petitioner's claims against them on March 23, 2007 and on April 13, 2007. The Respondents moved to dismiss Petitioner's Complaint on one or more of the following bases: failure to state a claim; lack of personal jurisdiction; laches; lack of service; no claim for punitive damages; statute of limitations bar; failure to serve a proper summons on the Respondents; immunity bars Petitioner's claims; res judicata bars the Petitioner's federal law claims; and no claim is available under O.C.G.A. § 20-2-720. However, the Petitioner did not file a timely response brief. Even when the Petitioner did respond, he never directly responded to the issues raised in Respondents' motion.

Under the Uniform Superior Court Rules, a party must serve and file a response to a motion. Sup. Ct. R. 6.2. Because Petitioner failed to timely or to adequately address the legal defenses raised in Respondents' Motion to Dismiss, his state law tort claims against the Respondents are abandoned and subject to immediate dismissal. The appeals court's order dismissing the complaint should be affirmed.

Petitioner's Complaint Must be Dismissed for Failure to Serve the Complaint on Respondent Jones or Cohen

The Petitioner's complaint is barred because of the failure to serve the complaint and summons – ever – upon Respondent Jones or Respondent Cohen. As a result, the Court had no personal jurisdiction over Respondent Jones or Respondent Cohen and the statute of limitations bars all of Petitioner's claims against these Respondents.

The failure to serve a complaint subjects the complaint to dismissal. *Sawyer v. Sawyer*, 253 Ga. App. 619, 560 S.E. 2d 86 (2002). Here, the Respondent failed to ever serve Respondent Jones or Cohen with a complaint and summons. More than 180 days passed since the Petitioner filed suit before the Respondents moved to dismiss his complaint on this basis. As such, Petitioner's complaint against these Respondents must be dismissed.

The Petitioner had the burden of showing that, once he received notice of a problem with service of the complaint, he exercised not only reasonable diligence, but the "greatest possible diligence" in perfecting service. *Duffy v. Lyles*, 281 Ga. App. 377, 636 S.E. 2d 91 (2006). The Petitioner was provided with notice of the service problem with Respondent Cohen and Jones around November, 2006, when the service was returned unperfected. Since the burden is on the Petitioner to show reasonable diligence, he cannot simply state in conclusory fashion that reasonable and diligent efforts were made. *Duffy*, 281 Ga. App. at 379. As the Court of Appeals has stated,

> The plaintiff has the burden of showing diligence in attempting to effect service, which must be supported by specific dates and details. The plaintiff cannot

> simply state in conclusory fashion that reasonable and diligent efforts were made. The Court of Appeals of Georgia is required to strictly apply the service requirements because notice is the very bedrock of due process. In all, the burden is on the plaintiff to ascertain a defendant's residence, and that obligation does not arise only upon expiration of the statute of limitation. *Duffy*, 281 Ga. App. at 379.

Even if the Respondents had knowledge of the lawsuit, this does not excuse the Petitioner's failure to diligently attempt service of his complaint. "The applicable test ... is whether the plaintiff exercised due diligence, not whether the defendant had suffered harm." *Id.* The Petitioner has not provided any facts which would support the conclusion that he exercised the greatest possible diligence in perfecting service. As a result, the Petitioner is guilty of laches and dismissal of the complaint is required. *Parker v. Silviano*, 284 Ga. App. 278, 643 S.E. 2d 819 (2007).

The Georgia Court of Appeals affirmed the dismissal of plaintiff's complaint in the *Scott* case when the defendant was served thirty-one (31) days[4]

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[4] See also, *Elwell v. Cutler*, 185 Ga. App. 423, 364 S.E. 2d 81 (1987), where the trial court granted the motion to dismiss because of laches over untimely service of the complaint and summons. There was no issue that the Plaintiff's counsel knew of the Defendant's address. *McManus v. Sauerhoefer*, 197 Ga. App. 114, 397 S.E. 2d 715 (1990) (plaintiff guilty of laches for allowing sixty-three (63) days between the expiration of the limitation period and service.); *Williams v. Bragg*, 260 Ga. App. 377, 579 S.E. 2d 800 (2003). (Summary judgment affirmed on the basis of laches when Plaintiff not served until thirty-seven (37) days after filing of the complaint.).

after the statute of limitations expired because the law places the burden on the plaintiff to find the correct address of the defendant, and that burden arises prior to the expiration of the statute of limitations. *Scott v. Taylor*, 234 Ga. App. 543, 507 S.E. 2d 798 (1998).

As such, the appeals court's order dismissing the complaint should be affirmed.

Lack of Personal Jurisdiction over Respondent Jones or Cohen Because of Lack of Service

Because the Petitioner has failed to serve his complaint on Respondent Jones or Cohen personally, the Court has no personal jurisdiction over these Respondents. *Denny v. Croft*, 195 Ga. App. 871, 395 S.E. 2d 72 (1990). Hence, Petitioner's complaint must be dismissed and the trial court's order of dismissal affirmed.

Res Judicata Applies to All of Petitioner's Federal Law Claims

Because the U.S. District Court entered an order dismissing all of the Petitioner's federal law claims, then those claims are barred from being re-litigated in state court. O.C.G.A. § 9-12-40. The general rule is that the judgment of a competent jurisdiction is conclusive between the same parties and their privies as to all matters put in issue. *Helmuth v. Life Ins. Co. of Ga.*, 194 Ga. App. 685, 391 S.E. 2d 412 (1990). In the foregoing circumstances, those judgments are entitled to full

faith and credit. *Sharpley v. Davis*, 786 F.2d 1109 (11th Cir. 1986). Res judicata bars the Petitioner's federal law claims in his complaint. *Bradley v. Ga. Inst. Of Tech.*, 228 Ga. App. 216, 217, 491 S.E. 2d 453 (1997). Hence, the Respondents moved that the U.S. Supreme Court give full faith and credit to the district court's order and not allow the Petitioner's federal law claims to be re-litigated. Petitioner's federal law claims should be dismissed.

II. CONCLUSION

Based on the foregoing, these Respondents request that the United State Supreme Court deny Petitioner's writ of certiorari.

Respectfully Submitted,

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Court of Appeals
of the State of Georgia

ATLANTA, February 26, 2008

The Court of Appeals hereby passes the following order:

A07A2356. CHISOLM v. TIPPENS ET AL.

We affirmed the dismissal of Marvin Chisolm's pro se action asserting various federal and state claims arising from defendants' alleged actions in denying Chisolm access to his daughter's educational records and rejecting his request for a full evaluation of her to rule out a learning disorder, concluding that Chisolm's complaint failed to state a claim for relief. In particular, we found that defendant school officials and employees were immune from liability. Chisolm has filed a motion for reconsideration, repeating the enumerations of error asserted in his original brief and reiterating that defendants are not immune from liability because the facts show show that they acted willfully, maliciously, and with a deliberate intent to injure. Chisolm also contends that the state court should have granted summary judgment in his favor.

Chisolm has not demonstrated that we overlooked a material fact I the record or misapplied controlling authority. Accordingly, his motion for reconsideration in the above-referenced appeal is hereby DENIED.

Court of Appeals of the State of Georgia,
Clerk's Office, Atlanta, February 26, 2008

I certify that the above is a true extract from the minutes of the court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ William L. Martin, III Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARVIN CHISOLM, Plaintiff,	)	
v.	)	CAFN: 1:06-CV-2767-BBM
KELLY J. SULLIVAN, ET AL., Defendants.	)	

ORDER

This action is before the court on the Motion to Dismiss [Doc. No. 3] filed by Kelly J. Sullivan, Beverly Shoun, Gary Boling, Kathryn Jones, Heather Moody, Tara Gauntt, Tom Dohrmann, Joe Redden, Lindsey Tippins, Curt Johnston, and Betty Gray ("School District Defendants"); the Motion to Dismiss [Doc. No. 4] filed by the Cobb County School District ("Cobb County"); the Motion for Summary judgment filed by plaintiff Marvin Chisolm ("Mr. Chisolm") [Doc. No. 6]; and the Motion to Strike Various Filings by Mr. Chisolm [Doc. No. 1.8] filed by Cobb County and the School District Defendants ("defendants").

I. Factual and Procedural Background

On a motion to dismiss, the court accepts as true all factual allegations set out in the Plaintiff's complaint. See *Lotierzo v. Woman's*

World Med. Ctr., Inc., 278 F.3d 1180, 1182 (11th Cir. 2002). Therefore, except as otherwise noted, the following facts are taken from Mr. Chisolm's Complaint. As such, they do not constitute findings of fact by the court.

Mr. Chisolm is the father of Paris A. Chisolm ("Ms. Chisolm"), a student who attended Norton Park Elementary School and Floyd Middle School in the Cobb County School District, from October 3, 1997 through 2005. During this time, Mr. Chisolm was denied access to review school records, report cards, and progress reports pertaining to Ms. Chisolm. On October 15, 2003, Mr. Chisolm requested a full evaluation of Ms. Chisolm, to "rule out" a learning disorder. (Compl. ¶ 6.) Mr. Chisolm's request was denied. Thereafter, Mr. Chisoirn complained to the State Department of Education, the United States Department of Education Civil Rights Office, and elected officials. From 2004-2005, Mr. Chisolm withdrew his complaints while waiting to see if Floyd Middle School would place his daughter M special classes for reading and writing. Floyd Middle School did not do so, Mr. Chisolm also states that he was "harass[ed]" off of school grounds by a teacher, Ms. Kelly Sullivan. (Compl. ¶ 8.)

On October 9, 2006, Mr. Chisolm filed this action in the State Court of Cobb County against Cobb County and the School District Defendants alleging discrimination under Section 504 of the Rehabiliation Act, 29 U.S.C. § 794 (" Section 504"), violations of the Individuals with Disabilities Education Act, 20 U.S.C, § 1400 et

seq. ("IDEA"), violations of the No Child Left Behind Act , 20 U.S.C. § 6301 et seq. ("NCLB"), violations of parental rights under O.C.G.A. § 20-2-720, and various state claims including mental anguish, neglect, cruelty, reprisal, and defamation. Mr. Chisolm seeks $12,000,000 in general and special damages and punitive damages of $2,000,000.

II Discussion

A. Motions to Dismiss

Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") provides for the dismissal of an action when a complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In general, a complaint should, be dismissed under Rule 12(b)(6) only when it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v Gibson*, 355 U.S, 41, 45-46 (1957); see *Theoharous v. Fong*, 256 F,3d 1219, 1224 (11th Cir. 2001). .Accordingly, all facts that Mr. Chisolm has pleaded in his Complaint are accepted as true, and all "reasonable inferences therefrom are construed in the light most favorable to [hire]." *Bryant v. Avado Brands, Inc.*, 187 F.3d. 1271, 1274 n.1 (11th Cir. '1999). However, "conclusory allegations, unwarranted deductions of facts or *Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1246 (11th Cir, 2005) (internal quotations and citation omitted).

1. IDEAClaims

The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education that

emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living." 20 U,S.C. 1400(d)(1)(A). The statute permits plaintiffs to seek "remedies available under the Constitution, [Section 504], or other Federal laws protecting the rights of children with disabilities." 20 U.S.C. § 1415(1). Under the IDEA, state and local education agencies must identify children with disabilities and develop an annual Individualized Education Program ("IEP") for each child. 20 U.S,C. § 1414.[1] Mr, Chisolm argues that his daughter was not properly classified and treated under this Act.

In order to bring a claim in. federal court under the IDEA, the aggrieved party must first exhaust the administrative remedies available to him or her under the Case I :06-cv-02767-BBM statute. *N.B. v. Alachua County Sch. Bd.*, 84 F.3d 1376, 1378 (11th Cir, 1996); 20 U.S.C. § 1415(1). The Eleventh Circuit has held " any student who wants relief that is available under the IDEA must use the IDEA's administrative system, even if he [or she] invokes a different statute," *M.T.V. v. DeKalb County Sch. Dist.*, 446 F.3d 1153, 1158 (11th Cir. 2006) (internal quotations and citations omitted). Indeed, the "philosophy of the IDEA is that plaintiffs are required to utilize the elaborate administrative scheme established by the IDEA before resorting to the courts to challenge the

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[1] The IEP is a comprehensive document developed by a team made up of parents, teachers, and other school administrators outlining the goals of the child, and the special education and related services needed to meet those goals. 20 U.S.C. § 1414(d).

actions of the local school authorities." *N.B.*, 84 F.3d at 1378 (internal quotations and citations omitted). However, a plaintiff is not required to exhaust his administrative remedies when resorting to those remedies would be futile or inadequate. Id. at 1379.

Under the IDEA, parents seeking a remedy must first request "an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency," 20 U.S.C. § 1415(f)(1)(A). In Georgia, the Office of State Administrative Hearings conducts such hearings. O.C.G..A.. § 50-13-41(a)(1). If parents are dissatisfied with the administrative decision, they can then bring a civil action in either state or federal court. 20 U.S.C. § 1415(i)(2)(A). In this case, Mr. Chisolm has neither asserted that he has exhausted his administrative remedies, nor alleged facts indicating that pursuit of such remedies would be futile or inadequate. Mr. Chisolm mentions that he used a "grievance procedure[] (complaint) to upper echelon leadership, State Department of Education, and the US Department of Education civil rights office, and elected officials," (Compl. ¶ 6) but subsequently withdrew his complaints. Mr, Chisolm has set forth no facts indicating that he appeared before or received a ruling from the Georgia Office of State Administrative Hearings. Therefore, Mr. Chisolm has not exhausted the "administrative scheme established by the IDEA before resorting to the courts to challenge the actions of the local school authorities," *N.B.*, 84 F.3d at 1378 (internal quotations and citations

omitted). As set forth above, neither has Mr. Chisolm pleaded facts indicating that pursuit of his claim in the administrative system of the state of Georgia would be "futile" or "inadequate." *N.B.*, 84 F.3d at 1379.

Based upon this record, Mr. Chisolm has failed to state a claim upon which relief may be granted; therefore, defendants' Motions to Dismiss as they pertain to Mr. Chisolm's IDEA claims are GRANTED.

2. Section 504 of Rehabilitation Act of 1973 Claims

Section 504 of the Rehabilitation Act provides, to relevant part, that "[n]o otherwise qualified individual with a disability. . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ...." 29 U.S.C. § 794(a). Because Mr. Chisolm refers to Section 504 of the Rehabilitation Act in his Complaint and other pleadings, the court will analyze his general claim of "discrimination" pursuant to this statute.[2]

The Eleventh Circuit has repeatedly held claims asserted under Section 504 and/or the ADA

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[2] Defendants interpreted Mr. Chisolm's discrimination claim as a claim under 42 U.S.C. § 1983. However, Mr. Chisolm's complaint and subsequent motions make no reference to 42 U.S.C. § 1983. Rather, they reference the Section 504. Because "the plaintiff is the master of the complaint" this court will analyze Mr. Chisolm's discrimination claim pursuant to the Section 504, as pleaded. See, e.g., *Holmes Group, Inc., v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (200).

are subject to Section 1415(f)'s requirement that litigants exhaust the IDEA's administrative procedures to obtain relief that is available under the IDE.A before bringing suit under Section 504 and/or the ADA.'" *M.T.V.*, 446 F.3d at 1158 (quoting *Babicz by v. School Bd.*, 135 F.3d 1420, 1422 n.10 (11th Cir, 1998)). Therefore, the court's analysis supra section II.A.1, is equally applicable here. As such, defendants' Motions to Dismiss as to this claim are GRANTED.

3. NCLB Claims

Mr. Chisolm alleges that defendants violated his right of "parental involvement" under the NCLB, (CompL 4.) Whether Mr. Chisolrn's NCLB claims are brought pursuant to 42 U.S.C. § 1983 or under an implied private right of action, the court must first "determine whether Congress intended to create a federal right," or "intended to confer individual rights upon a class of beneficiaries" in order to entertain the case. *Gonzaga Univ. v. Doe,* 536 U.S. 273, 283, 285 (2002). Indeed, the Eleventh Circuit has never recognized that the NCLB creates an individual right or private cause of action.

Neither does this court read the NCLB to indicate an, intention by Congress to create a private cause of action enforceable in a court of law or an individual right. See *Alliance for Children, Inc. v. City of Detroit Publ. Sch.*, ---- F, Supp, 2d ---, No. 06-15021, 2007 WL 576047, at *7 (E.D. Mich. Feb. 15, 2007); see also *Fresh Start Acad. v. Toledo Bd. of Educ.*, 363 F. Supp. 2d 910, 916 (N.D. Ohio 2005); *Ass'n of Cmty. Orgs. for Reform Now v. New York City Dep't of Educ.*, 269 F. Supp. 2d 338, 347 (S.D.N.Y 2003). Rather, the court is aware that

when Congress enacts legislation pursuant to its spending power, "the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1., 28 (1981).

Particularly when Congress codifies an enforcement scheme, such as that of the NCLB, "[i]t is implausible to presume that the same Congress nontheless intended private suits to he brought before thousands of federal- and state-court judges, which could only result in the sort of 'multiple interpretations' the Act explicitly sought to avoid." *Gonzaga,* 536 U.S. at 290 (discussing the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, et al. ("FERPA")). Likewise, if Congress seeks to create new rights enforceable under 42 U.S.C. § 1983, "it must do so in clear and unambiguous terms -- no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action." *Id.*

Because the NCLB does not create a private cause of action or create individual rights, Mr. Chisolm can prove no set of facts that would entitle him to relief in this court under this statute; therefore, defendants' Motions to Dismiss as to this claim are GRANTED.

4. State Law Claims

In his complaint, Mr. Chisolm also raises several claims under Georgia State law. Specifically, he alleges a violation of O.C.G.A. § 20-22-720 for

defendants' failure to render Ms. Chisolm's educational records to him.[3] Mr. Chisoim's other claims under Georgia law include: mental anguish, neglect, harassment, cruelty, reprisal, and defamation.

Although the district court has discretion to retain jurisdiction over a remaining state claim once federal claims have been dismissed, "federal courts have been encouraged to dismiss pendent state claims if all federal claims are resolved," *Rutledge v. Aluminum, Brick & Clay Workers Int'l Union,* 737 F,2d 965, 970 (nth Cir. 1984). Having been directed to no Georgia case law interpreting O.C.G.A. § 20-22-720, and finding none on its own, the court finds that this is a particularly inopportune case in which to exercise discretionary jurisdiction. Therefore, the court chooses not to exercise jurisdiction over Mr. Chisolm's remaining state claims and will DENY defendants' Motions to Dismiss on the state claims. Accordingly, all state law claims are to be REMANDED to state court.

B. Motion for Summary Judgment and Motion to Strike

Because this court has GRANTED IN PART the defendants' Motions to Dismiss and is

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[3] Instead of addressing Mr. Chisolm's claim under O.C.G.A. § 20-22-720, defendants interpreted Mr. Chisolm's failure to turn over educational records claim as one under FERPA. Again, the plaintiff is the master of his complaint, and it is upt o him to decide what law he intends to rely upon. *Holmes Group,* 535 U.S. at 830-31. Since Mr. Chisolm seeks relief under O.C.G.A. § 20-22-720, the court will not construe this claim under FERPA.

remanding Mr. Chisolm's remaining claims to state court, the Motion for Summary judgment filed by Mr. Chisolm [Doc, No. 6] and the Motion to Strike Various Filings by Mr. Chisolm [Doc. No. 18] filed by defendants are each DENIED AS MOOT.

II. Summary

For the forgoing reasons, the Motion to Dismiss [Doc. No. 3] filed by the School District Defendants and the Motion to Dismiss [Doc. No. 4] filed by Cobb County are GRANTED as to all claims asserted pursuant to federal law, and DENIED as to Mr. Chisolm's state law claims, Mr. Chisolm's Motion for Summary Judgment [Doc. No. 6] and. the defendants' Motion to Strike Various Filings by Mr. Chisolm [Doc. No. 18] e each DENIED .AS MOOT. The remaining state law claims are REMANDED to the State Court of Cobb Counter, Georgia.

IT IS SO ORDERED, this 19th day of March, 2007.

s/ Beverly B. Martin

BEVERLY B. MARTIN

UNITED STATES DISTRICT JUDGE

SUPREME COURT OF GEORGIA

Case No. S08C1099 Atlanta, June 20, 2008

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

MARVIN CHISOLM v. LINDSEY TIPPENS, et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Hines, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Therese S. Barnes, Clerk